Supreme Court, U. S.
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IN THE

Supreme Court of the United States

TERM, 1978

No. 77-1194

RODOLFO LOZANO

Petitioners,

v.

TEXAS MEXICAN RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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TEXAS MEXICAN RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Rudolfo Lozano, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its judgment in the above entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 564 F.2d 720. The judgment of the District Court for the Southern District of Texas is not reported but is set forth in appendix B(1) to this Petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

The order of the United States Court of Appeals for the Fifth Circuit was entered on December 15, 1977.

QUESTIONS PRESENTED

The question presented here is whether sufficient evidence of negligence was adduced at time of trial to justify submission of the case to the jury.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides in pertinent part as follows:

> "in Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law."

The applicable statutory provisions involved, herein, are the Federal Employers Liability Act, Sec. 1 et seq. as amended, 45 U.S.C.A. Sec. 51 et seq. which reads in pertinent part as follows:

> "every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and foreign nation or nations, shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce, or, in case of

> the death of such employee, to his or her personal representative, for the benefit of surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wars, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely insubstantially, effect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Supreme Court Rule 19 dealing with considerations governing review on certiorari reads in pertinent part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> (b). Where a Court of Appeals has rendered a decision then....; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercist of this Court's power of supervision.

STATEMENT OF THE CASE

A. The Original District Court Proceedings.

Petitioner filed this case in the District Court of the Southern District of Texas, Laredo Division, on March 30, 1976, seeking a Judgment for THREE HUNDRED NINETY FIVE THOUSAND DOLLARS ($395,000.00) for injuries sustained by the Petitioner on or about September 23, 1974, while working as an employee of the Texas Mexican Railroad Company on a railroad bridge owned by the Texas Mexican Railroad Company near Hebbronville, Texas. Petitioner was injured when his foot slipped upon a freshly creosoted, wet and muddy railroad tie causing his leg to go between that tie and an adjoining tie. Petitioner fell from a standing position and landed on his buttocks causing the Petitioner to severly injure his back. Petitioner alleged that his injuries resulted from his employer's negligent acts, and, therefore, brought his action under the Federal Employers Liability Act. The Texas Mexican Railroad Company filed its Answer denying Petitioner's allegations and averring that the Petitioner's injuries, if any, resulted solely from his own negligence. This matter commenced trial before the Honorable Robert O'Connor, Jr., Judge of the United States District Court, Southern District of Texas, Laredo Division. At the completion of all evidence presented by both the Petitioner and the Defendant, the Presiding Judge granted the Defendant's Motion For a Directed Verdict.

B. Proceedings in the United States Court of Appeals for the Fifth Circuit.

The Petitioner timely filed his Notice of Appeal and perfected his appeal in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals placed this matter on the summary

calendar in accordance with its Rule 18 for the United States Court of Appeals for the Fifth Circuit.

C. Decision Of The Court Below.

The United States Court of Appeals for the Fifth Circuit ruled, on December 15, 1977, that the evidence presented in a District Court did not provide any factual basis for a finding of negligence on the part of the Defendant. The United States Court of Appeals for Fifth Circuit thereupon affirmed the action of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decisions below encroach upon the rights of employes under the Federal Employers Liability Act. They are in conflict with applicable decisions of this Court construing that statute.
2. The trial court concluded that a railroad defendant in F.E.L.A. case, which enjoyed the benefits of an employees services for many years could defeat his just claim for recompense for injuries suffered. Both the original trial court and the appeals court improperly withheld from the province of the jury the issue as to whether the Defendant was negligent within the meaning of the F.E.L.A.
3. The decision of the Circuit Court of Appeals for the Fifth Circuit is in clear conflict with a long and continuing series of cases decided by this Court demanding that such issues be submitted to the jury. Reversal of this decision is a necessity under the current rules of law and to carry out the Congressional intent of that body of legislation commonly referred to as the Federal Employers Liability Act.

4. There is a clear conflict between the decision of the Court of Appeals for the Fifth Circuit and this Court. Standards enunciated by this Court for submission of a cause tried under the auspices of the Federal Employers Liability Act are most clearly set forth in *Rogers v. Missouri Pacific R. Co.*, 356 U.S. 326 (1958), in which this Court clearly stated that, "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." This Honorable Court has continued to uphold and enforce this standard through numerous cases brought before this Court on this very issue.

5. It is interesting to note that the decision of the Court of Appeals for the Fifth Circuit states in pertinent part, . . . "however, continuing repairs under such weather conditions is a common practice in the industry and had not been considered negligence." *Detroit, T. & I. R. Co. v. Banning*, 173 F.2d 752. In citing this particular case law, the Fifth Circuit has erred. The case law cited by the Fifth Circuit is case law developed prior to the Rogers decision and, more importantly, a case which has been soundly criticized if not completely reversed. This particular case employed the rule that, "troublesome or severe climatic conditions are common place in the year round operation of interstate carriers. A temporary dangerous working condition resulting therefrom is not by itself a negligent failure on the part of the carrier to provide the employee a safe place in which to work." Ibid, at 755. In employing this alleged rule of law, the Circuit Court, in that case, made citation to *Missouri P. R. Co. v. Aeby*, 275 U.S. 426. Both the Banning and the Aeby case have received severe criticism. The incorrect reasoning of *Missouri Pacific Railroad Co. v. Aeby* was cited and correctly disposed of by this Court in *Tiller v. Atlantic Coastline R. Co.*, 318 U.S. 54, at p. 58, note 2. Both the *Aeby* decision and the *Tiller* decision have been subsequently cited by the United States Court of Appeals for the Eighth Circuit in *Chicago and Northwestern Railway Company v. Rieger*, 326 F.2d 329. In a

well reasoned, exhaustively annotated opinion by that Circuit, the Circuit Court cited many other cases correctly setting forth the rule of law that the railroad has a duty to furnish sufficient instruments and other aids to decrease the danger from climatic conditions if this can be reasonably done. The duty to use reasonable care is a continuing one which is not relieved by fleeting circumstances.

6. Similarly, the United States Court of Appeals for the Fifth Circuit appears to have relied on the Banning Case for the dual purpose. In its earlier cited statement that, ". . . continuing repairs under such weather conditions is a common practice in the industry. . .", the Circuit Court seems to have concluded that common industry practices either indicate a lack of negligence or indicate the appropriate standard of conduct which will free the carrier of liability. Similarly, the Trial Court was apparently of this same opinion when the Presiding Judge stated that the fact that the duties performed by the Petitioner were performed in the manner in which they had always been performed it eliminated the question of negligence. (see Appendix A, page 108, line 15-22, page 109, line 10-13, page 110, line 3-22, page 111, line 6, 7, 8). The application of such rule of law is clearly erroneous and simply an incorrect statement of the proper test of the rule for the submission of such evidence to the jury. This Honorable Court, many years ago, in *Behymer v. Texas & Pacific R. Co.*, 189 U.S. 468, stated that, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Hence a showing of industry practice does not, in and of itself, free the Defendant from negligence nor dictate that the Plaintiff is automatically bereft of his cause of action.

7. In directing a verdict for the Defendant, the Trial Court dissolved all factual issues in favor of the Defendant and adversely to the Petitioner. The Trial Court's granting of a directed verdict and its affirmance by the Fifth Circuit is a departure from the basic and fundamental features of the system

of federal jurisprudence, i.e., the Petitioner's right to trial by jury which "is part and parcel of the remedy afforded railroad workers under the Employers Liability Act." Bailey v. Central Vt. R. Co., 319 U.S. 350, at 354.

CONCLUSION

The decision below is clearly erroneous. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

RODOLFO LOZANO	()	
VS	()	CIVIL ACTION
TEXAS-MEXICAN RAILROAD	()	NO. 76-L-22
COMPANY	()	

* * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

March 1, 1977

(Excerpt)

* * *

APPEARANCES:

HONORABLE ROBERT O'CONOR, JR., JUDGE
PRESIDING

MR. WILLIAM T. LIDDELL
and
MR. DAVID HAAG
COUNSEL FOR PLAINTIFF

MR. JORGE C. RANGEL
and
MR. LEV HUNT
COUNSEL FOR DEFENDANT

MR. RICARDO J. BUITRON
AGENT FOR DEFENDANT

BE IT REMEMBERED that on the 1st day of March, A.D. 1977, there came on to be heard before the Honorable Robert O'Conor, Jr., Judge of the United States District Court, Southern District of Texas, Laredo Division, presiding in the United States District Court, Southern District of Texas, Laredo Division, with the intervention of a jury, the above entitled and numbered cause;

WHEREUPON, the following excerpt of testimony of the Plaintiff, Mr. Rodolfo Lozano, and the two witnesses who testified on behalf of the Plaintiff, i.e., Mr. Robert Trevino and Mr. Jose Avalos, together with all comments made by Counsel and the Court relating to Defendant's Motion for Directed Verdict, and together with objections, replies, remarks, rulings, comments, and exceptions in connection therewith, was presented before said Court, to-wit:

* * *

THE COURT: Civil Action No. 76-L-22. What announcement does the Plaintiff have? Are you ready for trial?

MR. LIDDELL: We're ready for trial.

THE COURT: What announcement does the Defense make?

MR. RANGEL: The Defendant is ready.

THE COURT: All right. Will the jurors please rise and be sworn?

(Wherein, the Court Clerk swears in the jury.)

THE COURT: Please be seated.

Does anyone want the Rule invoked as to the witnesses?

MR. RANGEL: The Defendant will invoke it.

MR. LIDDELL: We would also.

THE COURT: All right. Are there any witnesses in the courtroom? Well then, there's no one to invoke the Rule to.

You will tell your witnesses as they come in that the Rule has been invoked and they must stay outside of the courtroom during the taking of testimony, and that they are not to discuss the case amongst themselves or with anyone else, and they should — with the exception, of course, of the attorneys involved, and at that time with only one witness at a time

speaking to the particular attorney. You will warn them that the Rule has been invoked, and then we won't have any difficulty.

MR. LIDDELL: Your Honor, if I may, earlier Defendant's counsel and I discussed if it would be possible if we could allow Mrs. Lozano to remain in the courtroom after her testimony.

THE COURT: I will excuse Mrs. Lozano from the Rule.

Anyone else? Do you want any witnesses excused from the Rule over here?

MR. RANGEL: No.

THE COURT: Do you wish to make an opening statement at this time?

MR. LIDDELL: Yes, I do.

May I approach the jury to make the opening statement?

THE COURT: Sure.

MR. LIDDELL: Ladies and gentlemen of the jury, my name is tommy Liddell, and I and Mr. Haag represent Rodolfo Lozano, the Plaintiff in this case, in a suit against the Texas-Mexican Railroad Company. I want to say a few things briefly this morning to give a road map, to show you where the evidence will go on behalf of the Plaintiff.

This is an action under the Federal Employer's Liability Act. This is a Federal statute that has been passed by Congress that requires an employee of a railroad who is injured while working for that railroad to bring an action at law in order to recover from his employer.

It's not an automatic thing that he makes recovery when he's injured on the job. He must come to this courtroom and prove to you and to the Bench that he has a right to that recovery.

Now, I want to emphasize that Mr. Lozano is going to testify as to the events that occurred, and put on evidence regarding what we feel is the negligence of the railroad that caused him to suffer the grievous injuries that he did sustain.

We will also give you evidence as to what his losses and damages have been.

Now, in the course of this trial, there will be many terms. I have reason to believe that whenever the Judge will give you

his instructions on the law, I will mention that there are a couple of terms that you will hear. One is "burden of proof."

We have a burden of proof. The Plaintiff has the burden of proving what he says. The Defense has to prove nothing. We must prove what we have alleged.

Now, the standard of that proof is called a preponderance of the evidence. Now, ladies and gentlemen, I will ask you to understand that rather lengthy term "preponderance of the evidence" doesn't mean we have to knock the scales of justice over. We merely have to tip them in our favor. This is not a criminal action. We do not have to prove anything beyond a reasonable doubt. We merely have to prove it by our burden of a preponderance of the evidence.

Now, also I'd like for you to understand, and I have reason to believe that the Judge, when the trial ends, will give you instructions that tell you that Mr. Lozano is entitled to recover from the Railroad, if he can demonstrate through their negligence, however slight or however small, caused his injury in whole or in part, even though to the slighest degree.

Now, this is not an automobile injury case. This is not any other case than an action brought by an employee of a railroad under the governing Federal statute.

Now, I would briefly like to tell you that Rudy is a citizen of the City of Laredo. He has lived here all his life. He will be testifying as to his background and his education, his job background, what happened, how it happened. We have some other witnesses who will be telling you what they saw and what they observed.

Now, these people, of course, are neighbors of yourself. Like yourselves, they are going to have to sit on the stand and be subject to questioning by myself and other counsel. And I'd like you to understand that this causes people to be nervous. If I had to sit up there and be asked questions, I'd be nervous too. I would like you to understand that people are going to be nervous.

Additionally, there are other persons in the court that were not present yesterday. I don't believe he was introduced to the jury, but Mr. Buitron, the gentleman in the maroon coat, is the Claims Agent for the Texas-Mexican Railway. He's present with the Defendants today. I would like you to know who all is here and what roles they perform.

Now, Rudy is not going to take the stand and tell you that he is a hopelessly crippled man. That's very obvious that he's not. He can walk and get around.

We are going to bring evidence through physicians, two of whom we will have to put on by evidence by what is called a deposition, a statement taken under oath, that Mr. Haag and I will ask him the questions that were asked in the depositions. We'll put that evidence in that way because these physicians cannot be here with us. However, during the course of the trial we hope to bring Dr. Riddle, so he can tell you in person what happened to Rudy and what he observed about Rudy.

Now, in closing, I would like again for you to remember that this is not an automatic thing for Rudy, simply because Rudy was injured while he worked for an employer does not mean that he is going to recover. That decision will be left in your hands. That is up to us to present you with sufficient evidence for you to find that Rudy was in fact injured and that he has those damages.

Now, there are several things about a lawsuit like this that lawyers in the lawsuit agree to. Now, Rudy has to show several things. He has to show that the Texas-Mexican Railroad was engaged in interstate commerce at the time he suffered his injury. That will be submitted to you as a stipulation, it was stipulated to in a pretrial order. You folks won't be concerned with that.

Rudy also has to show he was injured in the course and scope of his employment. That's been agreed to. You won't be concerned with that.

Further, Rudy has to show that he and the Texas-Mexican Railroad at the time he was injured were engaged in acts in furtherance of interstate commerce. We all agreed to that, so you won't be concerned with that.

Lastly, he has to show that an accident occurred. We all agreed that what we say happened, that he did have an injury, that he did fall on September 23rd, 1973.

That's where we stop agreeing. I think probably defense counsel for the Railroad is going to have some words to say to you. He's going to say that if Rudy got injured at that time, that he had some problems before that time that really caused

it. I think he's also going to tell you that the Railroad was not negligent in the conditions that they allowed Rudy to work under. However, we say the opposite. We say that this fall has caused all of his problems with his physical condition, has caused emtional upset, nervous upset that he's encountered, caused his wage losses, etcetera.

Lastly, we feel like — I have reason to believe that the Court at the time he gives the jury instructions will tell you that the Texas-Mexican Railway, by statute, by case law, has an indelible duty, that means a duty they can't put off on anybody else it's their duty to provide Rudy Lozano with a safe place to work. We feel like our evidence will show that the place where Rudy was working on September 23rd, 1974, was, if anything, unsafe.

Ladies and gentlemen of the jury, I have nothing more to say to you this morning in my opening statement. I trust that we will be able to put our evidence on and you will reach a conclusion favorable to the Plaintiff.

If in the course of presenting the case, if I do something that you don't approve of, I wish you will remember it's me, not Rudy Lozano. I make mistakes like everybody else. I'm a human being. If I personally offend you, forgive me, but don't hold it against my client.

THE COURT: Would you like to make an opening statement now?

MR. RANGEL: Yes. May I approach the jury box?

THE COURT: Sure.

MR. RANGEL: I was introduced to you yesterday as Jorge Rangel, and I along with Mr. Lev Hunt are representing the Texas-Mexican Railway Company in this case.

Mr. Liddell has mentioned some details about the case, and as the evidence is presented, more details are going to unfold.

We do agree in fact Mr. Lozano was injured on the 23rd of September, 1974. However, we state, and we believe that the evidence will show, that in fact the injuries incurred by Mr. Lozano were not the result of the negligence of the Texas-Mexican Railway Company. The evidence will show that in fact Mr. Lozano was provided with a safe place to work, but that he fell because of his own negligence.

The evidence will show that Mr. Lozano, while performing his duties that day, simply failed to take the proper regard for his own safety, and any injuries which resulted to his person resulted from this failure.

We will also show by evidence, again by deposition, by testimon, that after the injury Mr. Lozano in fact was treated by various doctors, had an operation. The testimony will show that he recovered from the injury. The operation was successful to the point where one of the doctors stated that all of the old pain had disappeared.

He was released to go back to work, in fact he did go back to work to the Texas-Mexican Railway Company and started working, worked from September of 1975 until February, 1976.

In February, 1976, he stopped working because he reinjured his back. And the evidence will show that even though his doctors have said that he's able to perform some work, he has failed and refused to go back to work.

So we, in the end, will hope that by the evidence which we present, that you will agree with us that the verdict should be for the Defendant.

Thank you.

THE COURT: Call your first witness.

MR. LIDDELL: Your Honor, we call the Plaintiff, Rudy Lozano.

THE COURT: All right. Step forward and be sworn.

(Wherein the Court Clerk swears in the Plaintiff, Rodolfo Lozano.)

RODOLFO LOZANO,

the Plaintiff, was called as the first witness in his own behalf, and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows, towit:

DIRECT EXAMINATION

BY MR. LIDDELL:

Q Rudy, would you state your full name, please?

A Rodolfo Lozano.

Q Where do you live?

A 2605 Lyon Street here in Laredo, Texas.

Q Are you married, Rudy?

A Yes, sir.

Q Rudy, how many children do you have?

A Six.

Q Rudy, how long have you been employed by the Texas-Mexican Railway Company?

A Since August, 1959.

Q All right. Rudy, how old are you now?

A Forty.

Q Rudy, on the day of the accident made the basis of this lawsuit, September 23rd, 1974, what was your age?

A I was thirty-eight.

Q All right. Rudy, are you presently employed by anyone?

A No, sir.

Q Rudy, were you working for the Texas-Mexican Railway on September 23rd, 1974?

A Yes, sir, I was.

Q Rudy, would you tell us where you were working?

A I was working at the bridge, Milepost 78.80. It's east of Realitos, Texas.

Q All right. Rudy, where did you start that morning? Did you begin your work duties here in Laredo, or did you have to —

A No, sir. We started from Hebbronville.

A All right. All right. How did you get from Hebbronville to the work site?

A We got a car pool, sir.

Q All right. That was in a private automobile?

A Yes, sir.

Q All right. Who was riding with you, Rudy, do you recall?

A Yes, sir. It was Rafael martinez, Eduardo Gonzalez, Trinidad —

Q I'm sorry, I didn't hear the last name.

A I can't recall his last name now, Trinidad.

Q All right. Rudy, are those the people you normally work with each day?

A Part of them, sir.

Q All right. Then is it correct that you drove together to Hebbronville; is that correct?

A Yes, sir, we did.

Q All right. When you got to Hebbronville, what did you do then?

A We reported — we got to Hebbronville around 7:00, and we stayed there until around 8:00, when we started working.

Q All right. Did you, as best as you can recall, were you doing anything in particular between 7:00 and 8:00 o'clock in the morning of that day?

A No, sir, we were just in the bunk car. Yes, sir, we have a bunk car there.

Q Then, at about 8:00 o'clock, what did you do then?

A We started working. We got in the company truck and left for the work site.

Q All right. I believe you stated earlier the work site for that day was bridge 78.80.

A 78.80, yes, sir.

Q Rudy, would you describe for the jury what this bridge is like? I mean, is it a bridge with, you know, high steel girders?

A It's made out of wood, sir.

Q All right. Rudy, I'd like to show you a set of photographs, if I may, and I'll request that they be marked Plaintiff's Exhibits No. 1, 2, 3, 4, 5, 6 and 7.

(Wherein, Plaintiff's Exhibits 1 through y were marked for identification by the Court Clerk.)

BY MR. LIDDELL:

Q Rudy, I have a series of photographs here that I have had marked as Plaintiff's Exhibits 1 through No. 7. I'd like you to examine those photographs, if you will, Take your time. Take your time and look at them, each of them individually.

All right. Rudy, do you recognize what is portrayed in those photographs?

A I beg your pardon?

Q Do you recognize what those photographs show?

A Yes, sir.

Q Is that the b ridge we're talking about, located at 78.80?

A Yes, sir, it is.

Q All right. Now, Rudy, on the day in question was it raining?

A Yes, sir, it was.

Q All right. On the day in question was the bridge wet?

A Yes, sir, it was.

Q All right. Now, do those photographs show the bridge being wet, or do those photographs show it as being dry?

A Dry, sir.

Q Are those photographs a true and accurate representation of the appearance of that bridge on a dry, clear day?

A Yes, sir, they are.

MR. LIDDELL: Your Honor, at this time Plaintiff will offer into evidence Plaintiff's Exhibits 1 through 7.

MR. RANGEL: Your Honor, we'd like to have information as to when they were taken.

THE COURT: Have you offered them?

MR. LIDDELL: No, I haven't.

MR. RANGEL: We haven't seen them.

(Handed over to defense counsel.)

MR. RANGEL: Your Honor, could we ask the Plaintiff's attorney to stipulate as to when they were taken?

MR. LIDDELL: Your Honor, I'm not exactly certain when the investigator took these photographs. I don't believe we need to lay a portion of our foundation as to the date they were taken, merely that they are an accurate representation of the appearance of the bridge.

THE COURT: Do you want to ask him on voir dire about the representation?

MR. RANGEL: Well, go ahead and allow them.

THE COURT: Do you have any objection?

MR. RANGEL: No, sir.

THE COURT: They will be admitted.

MR. LIDDELL: Thank you, Your Honor.

Your Honor, could we allow the jury to examine these photographs at this time?

THE COURT: You may pass them to the jury.

MR. LIDDELL: Thank you.

Ladies and gentlemen of the jury, I would like to ask you to examine these and pass them down so we will know what we're talking about, what the area looks like.

THE COURT: You may continue with the questioning, Counsel.

BY MR. LIDDELL:

Q Now, Rudy, I believe you stated earlier approximately what time did you arrive at the bridge located at Milepost 78.80?

A Approximately 9:00 a.m., sir.

Q All right. Rudy, at the time that you arrived, was it raining at that location?

A I believe so, sir.

Q All right. I know it's probably hard, but was it raining real hard or kind of a drizzle, or was it a heavy rainstorm?

A I don't recall, sir.

Q All right. Rudy, I want to ask you: once you arrived at the work site, what did you do then?

A We started — it's all routine. You see, we get off the pickup, the truck, and just start working. The foreman tells us we're going to do this and this and that. We just follow orders, and everybody starts working. It's all routine.

Q Rudy, what did you start doing that morning? What was your assigned duty?

A Well, we were replacing ties.

Q All right. Now, Rudy, for my benefit and that of the jury, would you explain what the process is of replacing a tie on a bridge such as this, how it's accomplished.

A Well, you have to get down under the bridge and pull out the spikes. And there are some times that are bolted down to a stringer. There is a picture in those pictures that shows where it's bolted down to the stringer, and somebody has to get down and loosen the notes to pull out the bolts and pull out the ties. You have to get down under the bridge and come up again.

Q All right. Now, Rudy, some of the people may not be that familiar with railroad operations, and perhaps I'm not familiar enough. Now, would you tell us what a tie is? Is that a large piece of wood that the track is laid across the top of?

A The tie is a large piece of wood that the rail is laid on.

Q Now, would you explain what the stringer is?

A The stringer is a piece of wood below the tie.

Q All right. Rudy, would the stringer support the tie?

A The stringer supports the tie, yes, sir.

Q Rudy, why were these ties that you were going to replace that morning being replaced?

A They were old ties. We had to replace them. They were worn out a little.

Q Is this a matter of routine maintenance to replace these ties?

A Yes, sir, it is.

Q All right. Rudy, was there some emergency that morning that required these ties to be immediately replaced?

A No, sir, no emergency.

Q Rudy, who was your foreman that morning?

A Mr. Eduardo Gonzalez.

Q Now, when you arrived at the work site, did Mr. Gonzalez assign the duties to be performed?

A Yes, sir, he did.

Q All right. Did he assign the duties to all of the men in the work crew?

A Yes, sir, he did.

Q Now, Rudy, you named the people that you rode to Hebbronville with. In addition to those people, were there any other members of the work crew?

A Yes, sir, there were.

Q Who were those people?

A There was Anto. io Vasquez, Roberto Trevino, and Jose Avalos.

Q So, Rudy, as best you recall, how many men were there that morning working?

A Seven, sir.

Q Were you all wearing raincoats?

A No, sir, we don't — we weren't.

Q Rudy, have you worked in the rain before on the railroad?

A Yes, sir, we have worked in the rain before.

Q Have you worked on a bridge in the rain before?

A Yes, sir, we have.

Q Have you worked on this particular bridge in the rain before?

A Yes, sir, we have.

Q So, correct me if I'm wrong, would it be fair to state then that this was not an unusual thing that you were doing that day, replacing those ties?

A No, sir, it wasn't.

Q Now, Rudy, when you took out the old ties, you had to put in new ones. Where were the new ties that you wee going to put in?

A They were over to one side of the bridge.

Q All right. Rudy, were they down below or beneath the bridge, or just off to the side?

A I believe they were over to the side of the bridge.

Q All right. Rudy, how did you get the new ties up to put them into the bridge.

A Well, we carried them — two men carried the ties to the bridge, and set them there on the rail, and then installed them.

Q Rudy, how much does one of these ties weigh?

A Beg your pardon?

Q How much will one of these ties weigh on the average?

A I really don't know, sir. They are pretty heavy. They are eight by ten by, I believe, eight feet, approximately.

Q All right. Rudy, could you make — do you have an educated guess as to what they might weigh?

A Well, I'd say about a hundred and forty pounds or so.

Q All right. So if I understand correctly, two of you would go down and carry this up and put it in the bridge; is that correct?

A Yes.

Q Rudy, in order to replace these ties, is it necessary, so to speak, to unhook the rail? Do you have to undo the rail, is that necessary?

A We have to loosen the tie from the rail.

Q All right. Again, how do you go about loosening that tie?

A We pull out the spikes with a claw bar, and we pull it out. If there's one or two next to each other, we just pull all of them out and replace all of them at the same time.

Q All right. Rudy, as you were replacing these ties, putting these ties in, did the work you were performing in the course of doing it, did the men track mud up on the bridge?

A Yes, sir.

Q All right. Were all of the ties completely covered with mud?

A No, sir, just the spot where we were working at, from that end of the bridge.

Q Uh-huh. Was there any — to the best of your knowledge, was there any mud on the bridge before you-all started working on it?

A I don't think so, sir.

Q All right. Rudy, do you recall how many trips you personally made up and down to get these new ties before you had the fall?

A No, sir. There was quite a few trips I made.

Q All right. In the course of replacing these ties, that is, taking the old ones out and putting the new ones in, were there gaps opened up beyond the normal gaps between the ties on this bridge?

A We have to open gaps, yes, sir.

Q Rudy, can you guess for us how wide that gap would be when one of the ties is missing?

A When one of the ties is missing, the gap should be — I'd say approximately twenty-four or twenty-five inches.

Q All right. Rudy, what kind of shoes were you wearing that day?

A Safety shoes.

Q All right. Rudy, would you explain to the members of the jury what a safety shoe is, how it is distinguished from a street shoe.

A It has a safety toe. I mean a steel toe.

Q Are you required to wear those shoes when you are performing your duties like this?

A Yes, sir.

Q Do you know what the reason is, why you're required to wear those?

A In case anything falls on your foot, it will be protected by steel reinforcement.

Q All right. Rudy, the ties you were putting in, the new ties, were those ties creosote?

A Yes, sir.

Q Would you explain, as best you can, what creosoting is?

A Well, we only call it creosote. It's a black liquid that they put on the ties to make — conserve them.

Q Uh-huh. Rudy, when those ties are creosoted like that, are they slicker than, say, a piece of wood without creosote?

A Yes, sir, they are.

Q All right. If that creosoting gets wet, does it become slipperier yet?

A Yes, sir, it does.

Q Now, Rudy, while you were performing your duties that day, were you provided with any type of planking to go over these gaps that were opened?

A No, sir, we weren't.

Q Rudy, have you performed duties before for the Railroad wherein planking was present?

A No, sir.

Q All right. Rudy, now, when I say planking, I want to make sure that you and I understand what I'm saying. What do you understand by the word "planking"?

A Planking — we have got some plankings on some bridges that are on the outside of the bridge, to one side.

Q What is a plank, Rudy, basically?

A A plank is a flooring made out of wood with a handrail.

Q And how big is it? If we can do this, when we say a piece of planking, how big is it?

A Approximately four to six feet from the outside of the bridge from the outside of the tie.

A All right. And how wide is an individual piece of planking?

A Four by — four by ten or four by twelve.

Q All right. Could you have — please strike that.

Would it have been possible that morning, in your opinion, to put a piece of planking down over the gaps that were created by the removal of the tie?

A Yes, sir, it could have been possible.

Q All right. To the best of your knowledge, Rudy, is planking very expensive?

A No, sir, it's not.

Q Rudy, could you explain to us how you got hurt on September 23rd, 1974, what happened?

A Yes, sir. Well, I was working on the bridge with these other two men, and we were pulling out some spikes. These other men asked me for a claw bar that we needed, so I walked back a little. I was on one side of the bridge, and I walked to the other side. I mean, from the north to west. And I walked back a little to my right, and picked up a claw bar, and as I was coming back, I slipped.

Q Rudy, when you slipped, obviously — did you fall then?

A Well, sir, my left leg straddled one of the ties, and my other leg was up on another tie, and I hit my buttocks.

Q All right. Did you land on your buttocks then?

A Yes, sir, I did.

Q All right. Where was your left leg, Rudy?

A It was traveling between two ties, sir.

Q Now, Rudy, I don't think I understand you. Did it go between the tie or on top of the tie?

A It went between the two ties.

Q Where was your right leg?

A It was on top of another tie.

Q Now, Rudy, on September 23rd, 1974, the date that the accident happened, were there other jobs that you could have gone to other than to go out to that bridge?

A Yes, sir, there were.

Q Could you tell us what those jobs were?

A Yes, sir. On days like tha we usually — we usually — we were stationed in Hebbronville at that time. And we got a tool car, and we usually go to Alice — we got a material car, rather, and we usually go to Alice or come to Laredo and just haul material to our material car and have it there on hand for when we need it.

Q All right. Now, Rudy, specifically, on the day in question, what other jobs were available for your crew to be assigned to, to the best of your knowledge? What else could you have done?

A Well, we could have gone to get material from either Laredo or Corpus — or Alice, or we could have worked on the bunk car in Hebbronville.

Q All right. Now, Rudy, what is the title that is given to a crew like the crew you work on? What type of craft is that called?

A I beg your pardon?

Q What type of title is given to the kind of crew that you work on, that works on bridges and such?

A Bridge and building.

Q As well as doing work on bridges, do you also perform work on their buildings, the physical plant that they own?

A Yes, sir. Most of the time we're working in Laredo fixing buildings, warehouses, fixing the floor, roofs.

Q Is it normal for you to work on a bridge; is that correct?

A Yes.

Q Now, Rudy, what's your title — what is your job title as a member of that crew?

A Carpenter, sir.

Q All right. Now, Rudy, on September 23rd, 1974, did you tell anybody that you felt like it was unsafe to be working there?

A No, sir. We didn't, because when you work for the Railroad, you're supposed to follow orders and work as careful as we can.

Q All right. Rudy, did you ask the foreman or anyone else to be assigned to another job?

A No, sir, I didn't.

Q All right. Rudy, did you feel that it was unsafe to work on that bridge under those conditions?

MR. RANGEL: Objection, Your Honor, that's asking for a conclusion on the part of the Witness.

THE COURT: I'll sustain the objection.

MR. LIDDELL: Your Honor, we would make an offer of proof on that under the Federal Rules of Evidence. Is it not permissible for a witness to make a statement of his opinion even as to the ultimate issue?

THE COURT: If he's an expert witness. He's not been qualified as an expert.

MR. LIDDELL: All right. Thank you, Your Honor.

BY MR. LIDDELL:

Q Rudy, how many years, again, have you worked for the Texas-Mexican Railroad?

A Since 1959, sir, August, 1959.

Q What are your total number of years?

A Approximately seventeen.

Q All right. In those seventeen years, have you worked strictly as a carpenter on the bridge and building crew?

A No, sir.

Q Did you perform any other duties?

A Yes, sir. Track laborer.

Q All right. During that time, have you worked on most of the railroads owned by the Texas-Mexican Railroad?

A Yes, sir.

Q Have you performed all of the functions that are to be performed by the bridge and building crew; in other words, all of the tasks that a bridge and building crew may do, have you done those tasks?

A Yes, sir, I have.

Q Have you had an opportunity to observe other persons performing these same tasks?

A Yes, sir, I have.

Q Now, Rudy, I'd like to ask you, if I may, on September 23rd, 1974, did you feel — did you personally feel when you were working there that that bridge was unsafe to be working on?

MR. RANGEL: Objection.

THE COURT: Sustained.

MR. LIDDELL: Very well, Your Honor.

BY MR. LIDDELL:

Q Rudy, when you slipped and fell, did you see what you slipped on?

A Well, sir, all of the ties were muddy and slippery, and I was trying to be as careful as I could. But I just slipped and fell.

Q Did you slip in the mud?

A Yes, sir. It was — they were muddy.

Q All right. Now, Rudy, after you slipped and fell, did you complete your work that day?

A Yes, sir, I stayed there the rest of the day.

Q All right. Did you perform the same duties for the rest of the day?

A No, sir, I didn't.

Q Rudy, would you explain that to the jry?

A Well, after I slipped and fell I went to one side of the bridge and stayed there for, I don't know how long, and the rest of the day I was just picking up spikes and small things around, helping just pick up little things around.

Q After you fell, Rudy, did you experience any pain at that time?

A Yes, sir.

Q Where was that pain?

A It was in my low back, sir.

Q All right. Rudy, after you completed that work day on the date of the 23rd, did you then seek medical attention?

A No, sir.

Q All right. Did you return to work the next day?

A Yes, sir, I did.

Q All right. Rudy, approximately how long did you work before you sought medical attention?

A Until Friday of that same week, sir.

Q All right. Rudy, about how many days would that have been?

A Monday through Friday, five days.

Q Who did you see at that time, Rudy?

A I saw Dr. Riddle.

Q Dr. Riddle prescribed medication for you?

A Yes, sir, he did.

Q All right. Did he give you an other treatment?

A Yes, sir, he gave me therapy.

Q All right. Where was that therapy done?

A At the Ruthe B. Cowl Rehab. Center.

Q In Laredo?

A Here in Laredo, yes, sir.

Q Rudy, would you tell us what that therapy consisted of?

A It was a whirlpool and different kinds of massages, and hot irons or something that they put on you. I do not know the corect name for them.

Q All right. They didn't use any hot irons on your back?

A Hot pads or something like that.

Q All right. Rudy, how long did that therapy keep up, if you recall?

A Well, Dr. Ruddle gave me a slip for twenty — I believe it was twenty-four treatments.

Q All right. And how often did you take those treatments, every day or every other day?

A Well, the first week or two week I would go daily.

Q And then did you space them out after that for a period of time?

A He spaced them out after that for a long period of time, yes, sir.

Q After the completion of this therpay treatment, did you go to work?

A No, sir, I did not.

Q Did you go back to see Dr. Riddle?

A Yes, sir, I did.

Q What did Dr. Riddle do then?

A Dr. Riddle recommended me to see a neurosurgeon in San Antonio.

Q All right. Woudl that have been Dr. Branch?

A Dr. Branch, yes, sir.

Q Did you then go to see Dr. Branch?

A Yes, sir, I did.

Q Did Dr. Branch precribe any medication or other medical treatment for you?

Q Yes, sir, he recommended surgery.

Q All right. Did you have that surgery done immediately?

A No, sir, I did not.

Q All right. rudy, can you tell us why you didn't have it done right away?

A Because I was afraid of the surgery, and I told Dr. Branch so, and he said, "Well, let's keep on the therapy for some time and see how you react to it."

Q All right. Rudy, then how much time passed between these conversations with Dr. Branch and the time you decided to have this urgery?

A Approximately, sir — approximately a month or just a little over a month.

Q All right. Did you then return back to Dr. Branch?

A Yes, sir, I did.

A Yes, sir, I did.

Q Did he still continue to recommend surgery?

A Yes, sir.

Q Did you have the surgery done?

A Yes, sir, I did.

Q Where was the surgery done?

A It was done at Methodist Hospital in San Antonio.

Q All right. Did Dr. Branch perform this surgery?

A Yes, sir, he did.

Q All right. Rudy, did Dr. Branch ever explain to you what the surgery was about? Did he ever tell you what he had done?

A After the surgery?

Q Yes, sir.

A Well, he said —

MR. RANGEL: Your Honor, objection. We object to any hearsay testimony.

THE COURT: Sustained.

MR. LIDDELL: All right.

BY MR. LIDDELL:

Q Rudy, do you know where Dr. Branch operated on you then?

A Yes, sir, he removed a disc from my back, a lumbar disc, I believe they're called. I don't know for sure.

Q All right. Do you recall about when this surgery was done, approximately?

A Approximately January the 6th, '75.

Q All right. Now, Rudy, after that surgery was done, did you return to work right away?

A No, sir, I did not.

Q All right. Were you told by Dr. Branch to stay off of —

MR. RANGEL: Objection to anything that Dr. Branch may have said.

MR. LIDDELL: Withdraw the question, Your Honor.

THE COURT: All right.

BY MR. LIDDELL:

Q Did you stay off work at that time pursuant to doctor's orders?

A Yes, sir, I did.

Q All right. Now, Rudy, did you ever see Dr. Branch again after you were released from the hospital?

A Yes, sir, I did.

Q Do you recall the next time you saw him after this?

A No, sir, I don't recall.

Q All right. Rudy, after this surgery was done, did you ever return to work?

A Yes, sir, I did.

Q Do you recall when you returned to work?

A Yes, sir, it was September 2nd, 1975.

Q All right. Rudy, when you returned to work, did you return to the same job you were performing before?

A No, sir, I did not.

Q What job were you given when you went back?

A Signal maintainer helper, sir.

Q Had you ever been a signal maintainer helper before?

A Yes, sir, I have.

Q All right. What does a signal maintainer helper do? Tell the jury what that job entails.

A Well, a signal maintainer helper, you have to replace signal light masts, the ones that are on the intersections. We have to replace the whole mast once the wire goes out, we have to replace them. We have to trench holes. We have to use a drill — manual drill to drill holes in the rails, and that's about it, sir.

Q All right. Does that job require you to pick things up?

A Yes, sir.

Q All right. For example, Rudy, what do you have to pick up on that job?

A Well, you have to pick up — you would have to help the other persons pick up masts, the drill to drill the holes in the rail, and — there's a whole bunch of things.

Q All right. Does that job require you to do some bending and stome stooping?

A Yes, sir, it definitely does.

Q Do you recall the name of the men who worked with you doing this?

A Mr. Mike Cruz.

Q All right. Now, when you returned back to work on September 2nd, 1975, the very first day, do you recall what one of the duties or some of the duties assigned to you that very first day were?

A Yes, sir, I do.

Q Would you tell us what those were?

A Yes, sir. The very first day I got back to work after the operation I went to the shop. Our supervisor, Mr. C. M. O'Bryan was there. They had moved a motor rom, I believe it was a threader machine, a bolt threader and cutter machine. It's a big machine that burned — the motor had burned out. We replaced the motor, and we started the machine, and the motor was smelling real badiy as if it were burning. Our supervisor, Mr. O'Bryan, told me to pick up —

MR. RANGEL: I object to anything that somebody else may have told him.

THE COURT: Sustained.

BY MR. LIDDELL:

Q Rudy, during the time you returned back to work, were you still having pain in your back?

A When I first returned, I was much better. I was feeling a little better.

Q All right. Now, let me ask you, prior to September 2nd, 1975, when you returned to work, had you done any work since that surgery had been done, since January 6th of 1975, to September 2nd, 1975? Did you do any work for anybody that you got paid for?

A No, sir, I did not.

Q All right. Can you perform any of your normal work around your home?

A No, sir, because I got a whole bunch of boys, and they usually do all of the work for me.

Q All right. Were you taking medication during that time period?

A Muscle relaxers, yes, sir, I was.

Q All right. Now, let me see if I understand. You went back to work on September 2nd, 1975, and began duties and — now, how long did you continue work from September 2nd, 1975, to when you stopped working?

A Up to approximately, sir, on February the 23rd, the latter part of February of '76.

Q All right. Now, Rudy, during that time that you were working from September 2nd, 1975, to February, 1976, did you have increasing problems with pain in your back?

A Yes, sir.

Q All right. Do you have any increasing problems, say, for example, being able to sleep?

A Yes, sir.

Q All right. Now, Rudy, it's very important. When you were released to return to work, were you released under duty restrictions, that is to say, you couldn't go back to what you were doing before?

A Yes, sir, I was.

Q All right. Now, Rudy, prior to working for the Texas-Mexican Railway Company, did you ever work for anybody else?

A Yes, sir, I did.

Q Who did you work for?
A Guerra Hardware here in Laredo.
Q All right. What did you do for them?
A I started off as a delivery boy, delivering plumbing materials.
Q Did you hold any jobs with anybody else?
A No, sir, just with Guerra Hardware.
Q Rudy, what is the highest level of formal education that you have completed?
A I went to the tenth grade.
Q Here in Laredo?
A Here in Laredo, Martin High.
Q Rudy, why did you stop going to school after that?
A I beg your pardon?
Q I say, why did you stop going to school after the tenth grade?
A Because I got married, sir.
Q All right. To support your family.
A Yes, sir.
Q All right. Now, Rudy, since finishing tenth grade here in Laredo at Martin High School, have you had any other formal education?
A No, sir, none.
Q All right. Now, Rudy, I believe you testified earlier that after your surgery you felt better, or your pain were somewhat relieved; is that correct?
A Yes, sir.
Q All right. Now, Rudy, were you — between the time of the surgery January 6th, 1975, and the time you returned to work September 2nd, 1975, were you feeling better all during that time period?
A Well, I had my good days and may bad days, but mostly I was feeling better.
Q All right.
A I was feeling much better.

Q Rudy, do you recall when your deposition was taken by Mr. Rangel on January 7th, 1977, in San Antonio, Texas?
A Yes, sir, I do.
Q All right. Rudy, do you recall when Mr. Rangel asked you this question, and I'd like to quote the question: "Mr. Lozano, before this injury that occurred before — "

MR. RANGEL: I'd like to object from reaching for the deposition, on the grounds that he does not have a right to read questions that I asked him since he has a live witness here to testify, unless he's trying to impeach him.

THE COURT: I don't know what he's doing.

BY MR. LIDDELL:
Q Let me repeat. This is a deposition taken in San Antonio, Mr. Rangel asked you the following question: "Mr. Lozano, before this injury which occurred on or about September 23rd, 1974, had you ever had any other back injury?" Do you remember that question?
A Yes, sir, I do.
Q Do you remember how you answered that question?
A Yes, sir.
Q What was your answer?
A No.
Q All right. Rudy, have you been treated prior to September 23rd, 1974, for back pain?
A Yes, sir, I have.
Q All right. Who treated you?
A Dr. Riddle.
Q All right. Now, Rudy, would you explain to me why you answered Mr. Rangel "No" when he asked you that question?
A Yes, sir, because I did not consider that a back injury. Because my back was huting, I went to see the doctor. Right after I saw him I went back to work that same day, and I kept on doing my normal activity at home and everywhere else.
Q Rudy, did you lose any time from work prior to September 23rd, 1974, because of back pain?
A No, sir.

Q Did you stop doing anything around your house because of back pain?

A I beg your pardon?

Q Prior to September 23rd, 1974, did you stop doing anything around your house because of back pain?

A No, sir.

Q All right. Rudy, can you tell me approximately how much per month you earned while you were working for the Texas-Mexican Railway about the time of your injury?

A Yes, sir, a thousand dollars a month.

Q All right.

MR. LIDDELL: Your Honor, at this time I would like to offer into evidence the Defendant's answers to Interrogatories propounded to him by the Plaintiff, specifically those Interrogatories as they pertain to Mr. Lozano's earnings during the calendar years 1973, '74, and '75, and also those Interrogatories pertaining to future wage increases as contracted for.

MR. RANGEL: I believe the proper time for the introduction to answers to Interrogatories is at the time of the completion of the testimony of the Witness.

THE COURT: I don't understand. Are you going to impeach him with those statements?

MR. LIDDELL: We merely want to have some exhibits, some proper evidence for the jury to consider as to Mr. Lozano's wage earnings.

THE COURT: Why don't you do that after you finish with your questions.

MR. LIDDELL: All right, Your Honor. We'll do it at that time. Thank you.

BY MR. LIDDELL:

Q Rudy, what was the last date that you worked for the Texas-Mexican Railway?

Q The latter part of February, 1976.

Q All right. Have you worked since that date?

A No, sir, I have not.

Q Rudy, I believe you mentioned that you have six children. I'm sure that keeps things kind of busy.

Prior to September 23d, 1974, what kind of activities for, you know, leisure time activities did you engage in?

A Yes, sir. I used to go swimming, jogging, wrestle with my oldest boy and the rest of them, and karate. I was very active.

Q Did you like to go dancing with your wife?

A Yes, sir.

Q Rudy, after September 23rd, 1974, are you still able to do those, swimming, jogging, the dancing with your wife?

A Well, dancing, sir, I do a little dancing to a very limited extent.

Q You're not telling the jury that you can't do these things at all, are you?

A No, sir.

Q Rudy, when you are going — let's say, for example, you are going to go to a wedding, and you're going to be dancing at that wedding. Do you have — are there any special things you have to do before you go?

A Yes, sir.

Q What are they?

A I have to prepare myself in advance, take some muscle relaxers, rest, painkillers, maybe two or three days before.

Q You're going to make sure you can dance, are you?

A Yes, sir.

Q Okay. Now, Rudy, on September 23rd, 1974, did you see the mud on the bridge — did you observe the mud on the bridge before you slipped?

A Well, sir, where we were working on that particular spot, it was muddy and slippery, and I didn't particularly see the mud where I was going to step on. I know that part of the bridge was very slippery and muddy.

Q All right. Rudy, to the best of your knowledge did any other member of your crew ask the foreman not to perform those duties on that day?

A No, sir. When you work for the Railroad, you're supposed to follow orders, and that's what we are there for, and we work as carefully as we can.

Q All right. Rudy, have you ever had an occasion when you worked for the Railroad where the supervisor or foreman has come to you and asked you for your suggestions on how to do anything?

A Yes, sir.

Q When was that?

A Well, I'm the backhoe operator on bridges also besides carpentry, and since I'm the only one that knows how to operate the backhoe on bridges, the foreman comes to me and says, "Rudy, we are going to do this and that. What do you think we should do?" I tell him, "Let's do it this way." And he says, "Fine."

MR. RANGEL: Your Honor, may we object again to the hearsay testimony?

THE COURT: Well, it's already in. Overruled.

BY MR. LIDDELL:

Q Rudy, since February of 1976, when you completely stopped working for the Texas-Mexican Railroad, have you applied for any jobs?

A No, sir, I have not.

Q All right. Rudy, can you tell us why you haven't aplied for any jobs?

A Yes, sir. Because three or four days out of a week I'm — my back is hurting pretty bad, and I have to be resting.

Q Rudy, since February of '76, the last time you worked, have you been depressed, felt upset because you're not working?

A Yes, sir, I have.

Q Well, Rudy, you have a pretty good sized family. How do you feel about not being able to support your family?

Q It feels very bad.

Q Rudy, does your wife work?

A I beg your pardon?

Q Does your wife work?

Q Yes, sir, she does.

MR. LIDDELL: Your Honor, we have no further questions. Pass the Witness.

THE COURT: The Witness is passed for cross examination.

MR. LIDDELL: Your Honor, at this time we would like to move to introduce the Defendant's answers to the Plaintiff's Interrogatories into evidence.

THE COURT: He has a right to cross examination.

MR. LIDDELL: Before this — all right. Thank you, Your Honor.

CROSS EXAMINATION

BY MR. RANGEL:

Q Mr. Lozano, I believe you stated on direct examination that prior to September 23rd, 1974, you had not missed any days from wrk because of an injury or problems with your back; is that correct?

A Yes, sir.

Q What other problems with your back had you had before September 24, 19 - - I'm sorry, September 23rd, 1974?

A Well, I had some aches and pains, sir.

Q Did you ever go see the doctor or any doctor?

Q Yes, sir.

Q What doctor was that?

A Dr. Riddle.

Q All right. When did you see him?

A I saw him back in, sometime in September, 1973, I believe.

Q Was that the only time that you saw him for any back problems?

A No, sir, I don't believe that was the only time.

Q Did you see him on some other occasion?

A Yes, sir, I did.

Q When was that?

A I do not recall the date, sir.

Q Did you see any other doctor prior to September 23d, 1974, for any back problem?

A No, sir.

Q Mr. Lozano, is it a fact that from June 10, 1967, to September 27th, 1967, you were seen by Dr. Mata for back problems with particular reference to low back pain radiating to the left leg with numbness and weakness of the left leg?

A Yes, sir, my left leg was numb.

Q Did you in fact see Dr. Mata in 1967 for back problems?

A Yes, sir — well, not — my left leg was numb.

Q How many times did you see Dr. Mata?

A I do not recall, sir.

Q Do you recall being hospitalized, Mr. Lozano, from May 29th, 1967, commencing on that day for a period of nine days in Mercy Hospital for low back problems, including numbness of the left leg?

A Yes, sir. I was hospitalized for numbness in my leg.

Q And during the time you were in the hospital you were off work, were you not?

A Yes, sir, I was.

Q So how could you reconcile this with your previous statement that prior to September 23rd, 1974, that you had never been away from work because of back problems?

A Because when I saw Dr. Mata, my left leg was numb. That's what I felt, my left leg was numb, and I went to see Dr. Mata for that reason.

Q And you were in the hospital?

A Yes, sir, I was.

Q And you missed work?

A Yes, sir, I did.

Q How do you reconcile that with your statement that prior to September 23rd, 1974, you had not missed any days off work because of your back problems?

THE COURT: He already answered that question.

MR. LIDDELL: I object to the question. He answered the question.

THE COURT: That's correct. Move on.

BY MR. RANGEL:

Q Mr. Lozano, what prompted you to go see Dr. Mata in 1967?

A Because my leg — my left leg was hurting a lot.

Q What caused your left leg to hurt?

A I have no idea, sir.

Q Was there a particular accident or injury?

A None at all, sir.

Q Mr. Lozano, would you go back to September 23rd, 1974, on the day of the accident. I believe you stated that you arrived at the bridge located at Milepost 78.80 at 9:00 o'clock in the morning; is that correct?

A Yes, sir, approximately.

Q Okay. Were there seven members in the group that morning?

A I believe there were, sir.

Q How did the foreman assign the responsibilities to the different members of the crew for that day?

A Well, like I told you, it's -- we go to the work site. We get off the truck. The foreman says we are going to do this and this and this and this and that, and we follow his instructions, and every body knows what to do.

Q Did the foreman specifically assign different duties to different members of the crew?

A I do not recall.

Q I believe you stated that you were working on top of the bridge with Mr. Avalos and Mr. Trevino?

A Yes, sir, I did.

Q Does that mean that other members of the crew were working beneath the bridge or somewhere around the bridge, but not on top of the bridge?

A Yes, sir.

Q Would that mean that it would have been your duty along with Mr. Trevino and Mr. Avalos to stay on top of the bridge and to perform whatever duty was to be performed there, and the other members to stay off of the bridge?

A At the time of the accident I believe Roberto Trevino, Jose Avalos, and myself and I believe the foreman were on top of the bridge, except the foreman was outside of the bridge. Now, at the time of the accident — before that, we all got diferent jobs, and we all have to go down and up the bridge. But the whole brew has to do it.

Q Mr. Lozano, isn't it a fact that in fact the foreman assigns responsibilities to some members of the crew to stay on top of the bridge and other members of the crew to go underneath the bridge to work on the job that's to be done that day?

A No, sir. He just tells us what to do. I mean, what the particular jobs we were going to do that day.

Q Between 9:00 and 11:00, Mr. Lozano, how many times would you have gone from the top of the bridge underneath the bridge?

A I do not recall for sure, sir. It's very hard for me to tell.

Q Do you recall whether Mr. Avalos or Mr. Trevino at any time left the top of the bridge to go under the bridge?

A They might have.

Q Do you recall whether they did?

A I don't know for sure, sir.

Q It's possible that they did not?

A It's possible, because it's routine.

Q When were you on September 23rd, 1974, informed as to what the duties for the crew on that day would be?

A At 8:00 in the morning.

Q When you were in Hebbronville?

A Yes, sir.

Q When you got to the Milepost, you already had your orders in effect for the day?

A Yes, sir, we did.

Q What were those orders?

A To work on that particular bridge 78.80.

Q What kind of work were you to do on that bridge on that day?

A I beg your pardon?

Q What — you say you were going to work on the bridge. What kind of work were you going to do on the bridge?

A You see, there's a whole series of bridges at that particular place. There are about five or six bridges right there within a mile and a half or two mile area. We had been working on bridges, going towards Laredo, you know, or going west. And at that particular day we had to work on that bridge, and there's different things that we do.

Q Do you recall specifically the specific work that you were to do on that bridge on that day? A Let's see — when we go to work on a bridge, if we're going to replace ties, we replace ties. We line the bridge back up again, because when you pull out the ties, you usually have to align the bridge back straight again, you know. And you have to check for rotten stringers. You have to check — check the whole bridge.

Q But on a particular bridge there are a series of different jobs that can be done on that bridge, right?

A Yes, sir.

Q For example, you can epair a stringer or align the rail or replace a tie or check the braces or check the dents. There's different kinds of jobs that can be done on a bridge; is that correct?

A That's true.

Q All right. Do you recall specifically what specific job was to be done on that bridge that day?

A Well, as I told you, we were to align the bridge, we replaced what ties were bad, and I'm not too sure if we replaced a stringer on that particular day.

Q You're saying on that particular day you were going to align the the rails, replace ties, and perhaps —

A Perhaps, yes.

Q But you're sure you were going to replace the ties?

A Yes, sir. We replaced a tie — we replaced some ties.

Q Just prior to the accident, just prior to you slipping and falling, what were you doing?

A I was — I was going to pull out a spike from a tie, and I had to get a claw bar to pull it out with.

Q Where were you located on the bridge?
A I was located near the east side of the bridge.
Q Were you facing arail?
A Yes, sir, I was facing a rail.
Q Where were Mr. Avalos and Mr. Trevino located?
A I believe Mr. Trevino was on my left side and Mr. Avalos — I do not know for sure, sir. He might be farther — farther to my left or on back of me. I do not know for sure.
Q Were they also facing the rail?
A I believe so, sir.
Q And what was the next thing that happened after you were standing there facing the rail, what was the next thing that happened?
A Well, I moved back. I walked back towards my right to pick up the claw bar.
Q Claw bar?
A Claw bar.
Q How far from where you were standing was the claw bar located?
A I'm not too sure, sir. I'd say approximately five or six — approximately ten feet or so, more or less.
Q Was the claw bar in between the rails?
A Yes, sir, it was.
Q Did you have to walk in between the rails to go get the claw bar?
A Yes, sir, I did.
Q Did you walk in between the rails coming back with the claw bar?
A Yes, sir, I did.
Q How big was the claw bar?
A It's approximately five feet — approximately. We got different sizes.
Q this particular claw bar, how big was it?
A I'd say about five feet.
Q How much did it weigh?

A I don't have the slightest idea, sir. It might weigh from twenty-five or thirty-five pounds or forty pounds. I do not know for sure.
Q It was a heavy item, was it?
A Yes, it is heavy, sir.
Q As you were walking back with the claw bar, were you holding it with both hands?
A I do not recall, sir.
Q Could you have carried it with one hand?
A You probably could.
Q But you do not recall whether you were using one hand or two hands?
A I don't recall if I was using one hand or both hands, sir.
Q As you were walking back with the claw bar, where were you looking?
A I was looking at where I was stepping, sir.
Q Where were you stepping?
A On the ties.
Q Mr. Lozano, you mentioned that there was some mud on the bridge that morning. Were all of the ties — did all of the ties have mud on them?
A No, sir, not all of them.
Q Which ties had the mud?
A Well, partly the ones to the side that we were working on, sir.
Q Where was the mud located on the ties?
A It was — it was in different places, sir. It's very hard to tell. You step all over between the bridge — between the ties.
Q What color was the mud?
A Brown, I guess.
Q Do you recall as you were walking back with the claw bar, whether you looked down at the tie on which you slipped right before you slipped?
A Would you please repeat that question?

Q Yes. Do you recall whether, as you were walking back with the claw bar, you in fact looked down at the tie on which your foot slipped right before you slipped?

A Not right before I slipped, sir. I cannot recall.

Q So you do not recall whether in fact the tie on which you slipped had any mud?

A Yes, sir, it had mud.

Q When did you see the mud?

A When I fell down, sir.

Q So you did not see the mud before you fell, but you saw the mud after you fell?

A I do not recall, sir.

Q I'm sorry. You do not recall seeing what?

A I do not recall seeing the mud there.

Q When?

A When I slipped down.

Q Is it possible that if in fact you had looked down at that tie before you slipped, you could have seen that, since the entire tie was not covered with mud, you could have stopped somewhere else where there wasn't any mud?

A Well, sir, there was not — the mud, they were not big chunks of mud. Part of the tie had big chunks, part of it had just a little mud on them. But they were all very slippery.

Q On the particular tie which on, if you had looked at it before you slipped, could you have avoided stepping in the mud in which you say you slipped?

A I really don't know, sir.

Q The particular tie on which you slipped was not entirely covered by mud, was it?

A I do not recall that it was entirely filled with mud.

Q Mr. Lozano, do you recall whether at the time you slipped, which was around 11:00 o'clock if I'm correct, whether at that time any ties had been replaced that morning?

A I believe so, sir.

Q Are you sure?

A Yes, sir. There might be one or two, sir.

Q Are you saying that there was one tie replaced, two ties —

A A few, sir. I do not recall, because we never keep count of the ties we're going to replace.

Q Do you recall for a fact that some had been replaced before you slipped?

A Yes, sir.

Q You do not recall how many?

A No, sir.

Q Do you recall whether the tie on which you slipped was an old tie or a tie which had been replaced?

A I do not recall, sir.

Q It's possible it was an old tie?

A It's possible. I do not recall.

Q Mr. Lozano, you stated also that that morning you had replaced one or two ties by 11:00 o'clock?

A I don't know for sure, sir. We had replaced some ties.

Q Okay. In replacing those ties, you obviously had to remove some old ties, right?

A Yes, sir.

Q And you said that in removing ties, you left some gaps?

A Yes, sir.

Q Do you recall, Mr. Lozano, whether on the way to get the claw bar you walked over any of these gaps?

A I do not recall, sir.

Q Do you recall whether on the way back with the claw bar you walked over any of these gaps?

A I do not recall, sir.

Q Do you recall whether when your foot slipped on a tie — on that day, whether it slipped into one of those gaps or whether it slipped into just the regular space between two ties?

A No, sir, I don't recall whether it was —

Q It's possible that it slipped in between the regular space between two ties?

A Yes, sir, it's possible.

THE COURT: I think at this time we'll take an afternoon recess. We'll take a twenty minute recess and be back at 4:00 o'clock. You can go across the street and get some coffee if you so desire. Don't talk about the case or discuss it at this time.

(Wherein, a recess was taken.)

THE COURT: You may proceed.

BY MR. RANGEL:

Q Mr. Lozano, I believe your earlier testimony, when I was asking you some questions, you stated that when you were walking back with the claw bar, your foot might have slipped in the regular space between two ties; is that correct?

A My foot slipped on one tie.

Q I'm sorry. Your foot slipped on one tie, and then went into a space between two ties?

A Yes, sir.

Q And that space between two ties is usually about four or four and a half inches; is that correct?

A Approximately, sir.

Q And when you were walking back with the claw bar, you were walking parallel to the rails, were you not?

A I was walking at a kind of an angle, sir.

Q What kind of an angle?

A Well, there was a space approximately — I'd say approximately from where I was standing to where the bar was on the opposite side, there was a space of, I'd say, about six or eight feet, maybe, and then I walked at an angle.

Q Okay. When you were walking back with the claw bar, and — strike that.

What size shoe do you wear, Mr. Lozano?

A Eight, sir.

Q About how long is the shoe when it's on your foot, or the safety boot you were wearing on that day, about how long in inches would it be?

A Approximately four inches, I guess, more or less, maybe less. I don't know for usre.

Q I'm sorry. Are you saying the size of the boot is about four inches?

A Approximately.

MR. RANGEL: Your Honor, could I request of the Witness to extend his foot so the jury can see the length of it? I'm trying to estimate the length of it. I believe he stated four inches. I believe it's longer than four inches.

THE WITNESS: I'm sorry. I misunderstood the question.

BY MR. RANGEL:

Q What I'm saying is: how long was the safety boot you were wearing that day?

THE COURT: How high it was or how long it was?

MR. RANGEL: I'm sorry. Let me clarify the question. Thank you, Your Honor.

BY MR. RANGEL:

Q How long was the boot that you were wearing on that day?

THE COURT: What do you mean by "long"?

BY MR. RANGEL:

Q In inches, length, when you're standing flat on the ground with your boot on, how long in inches is the boot from the tip of your toe to your heel?

A I really don't know for sure. I have never measured it. About this long (Witness indicating).

Q That would be about ten inches?

A I would say so.

Q It would be somewhat larger than four to four and a half inches, would it not?

A Yes, sir.

Q So if you were walking on the bridge and your foot slipped on the tie, it would be almost impossible for that foot to go into the gap between the two ties, if that gap is four and a half inches, is that not correct?

A Well, the gap, sir, they are not exactly all the same size. The gaps in the ties, sometimes when you're removing ties along

the bridge, when you're loosening up the spikes, picking up the rail with a jack, the ties get loose from the rail, and then get a tendency to shuffle around a little.

Q On this particular day, on the space between the two ties through which your foot slipped, that space was about four to four and a half inches; is that correct?

A I don't know for sure, sir.

Q Mr. Lozano, you mentioned earlier something about handrails. Were they usually located on a bridge?

A Handrails are usually located outside the bridge.

Q How far from the rail would the handrail be loated, sir?

A Approximately five or six feet, somewhere in there.

Q If you had been standing at the place where you fell on the bridge, and if you had not been carrying anything, if you extended your arm straight out, could you have reached that handrail?

A No, sir.

Q Mr. Lozano, you also mentioned planking. Where would planking be located on a bridge, sir?

A Well, the planking that we got on some bridges, they are outside the tie.

Q Mr. Lozano, on this particular day when you fell, you were walking in between the rails, were you not?

A Yes, sir, I was.

Q And the planking would be outside the rail, would it not?

A Normally on the bridges that we have planking, they are outside the rail.

Q Mr. Lozano, you also mentioned earlier that you went up and down the bridge several times, and because of that you brought mud back to the bridge; is that correct?

A Yes, sir.

Q Mr. Lozano, did you wipe your boots on a drip-rack, which wa located near the bridge every time you were coming back to the bridge?

A We always — we have always got a — usually, when we get down on a muddy bridge, our shoes are filled with about an inch or so of mud, and we usually — it's just routine, we just wipe our feet on the drip-rack or rocks on top of the bridge.

Q And on this particular morning you wiped your boots on the drip-rack every time you were coming back up on the bridge; is that correct?

A As best I could, sir.

Q As best as you could, you did do that?

A Yes, sir.

Q Mr. Lozano, you earlier mentioned some prior back problems and back injuries that you had which were treated by Dr. Riddle and Dr. Mata. Specifically what was the treatment that was given to you by Dr. Riddle on the two occasions that you — I'm sorry — on the occasions that you saw him for back problems?

A I think he gave me some kind of a muscle relaxer.

Q Did Dr. Mata give you the same prescription?

A No, sir. Dr. Mata put me in the hospital.

Q After you were released from the hospital, did he give you some prescription or some treatment for your back problem?

A No, sir, he didn't.

Q Mr. Lozano, do you recall when you went to see Dr. Riddle right after you hurt yourself on September 23rd, 1974, the first time you went to see Dr. Riddle after that injury; do you recall that?

A Yes, sir, I do recall.

Q Do you recall that in relating what had happened to you, that you stated to Dr. Riddle that you hurt yourself while you were carrying a stringer?

A No, sir.

Q You do not recall that?

A No, sir, I don't.

Q Do you recall when you went to see Dr. Branch in San Antonio, and you told him what had happened to you; do you

recall stating to Dr. Branch that you hurt yourself while you were pulling a stringer?

A I do not recall for sure, sir.

Q After you saw Dr. Branch for the first time in San Antonio, did he recommend any kind of treatment or any therapy for you?

A I beg your pardon?

Q After you saw Dr. Branch in San Antonio for the first time —

A The first time?

Q In November of 1974, did he recommend any kind of treatment or therapy for you?

A He recommended me to have a myelogram.

Q When he sent you back to Laredo after that evaluation, when you were in the hospital, did he ask you to do any kind of activity?

A No, sir, he didn't.

Q Do you recall specificaly whether you were instructed to do certain kinds of exercises?

A Yes, sir, I do.

Q What kind of exercises?

A While I was in the Rugh B. Cowl Rehabilitation Center, like I told you, they put me in the whirlpool and they gave me some massages with something hot. I don't know what it is. And then I started with one of those bicycles for exercises.

Q Where did you do those exercises on the bicycle?

A At the Rehab Center.

Q During this time when you were going to the Rehab Center, did you do any exercises at home?

A Yes, sir, and they gave me a little booklet to follow.

Q What kind of exercises were those, sir?

A I had to lay down on my back and then pull myself up and raise my legs up and down.

Q Did you ever do any exercises which involved pulling your knee towards your chest ten or twelve times a day?

A I remember doing that kind of an exercise, but I do not recall whether it was before or after the operation at the Rehab Center.

Q Do you recall seeing Dr. Branch again around August of 1975, at which time you were released to go back to work?

A Yes, sir, I do.

Q Did you in fact go back to work with the Texas-Mexican Railway Company?

A Yes, sir.

Q Were you in fact earning at least what you had been earning before you stopped working with the Texas-Mexican Railway Company?

A Approximately. We might have had a raise or so.

Q So you earned at least as much and maybe more per hour, let's say?

A Yes, sir.

Q And how long did you work with the Texas-Mexican Railway Company from September, 1975?

A I worked from September 2nd to the latter part of February, which would be about five months.

Q And during this time you were able to discharge your duties, were you not?

A Not to the full extent.

Q But you were able to work for that period of time, at least, were you not?

A On and off, sir.

Q Why did you stop working with the Texas-Mexican Railway Company in February of 1976?

A Because my back — my back had been hurting for quite some time now, and I just couldn't stand it any longer.

Q Isn't it a fact, Mr. Lozano, that you stopped working for the Texas-Mexican Railway Company because you injured your back?

A No, sir, I did not.

Q Did you have any kind of accident during February, 1976?

A No, sir.

Q You do not recall straining your back in February of 1976?

A Well, I wasn't — I didn't strain my back, but —

Q How did you strain your back, Mr. Lozano?

A I did not strain my back that day, because all that time while I was working I was always — almost every day I was in pain, and I kept on seeing Dr. Riddle, and I'd say about once a week I had to go, and he gave me some kind of a shot and muscle relaxer and some kind of medicine I don't know anything about.

Q You did say you strained your back —

THE COURT: He didn't say he strained his back.

MR. RANGEL: I'm sorry. I stand corrected.

BY MR. RANGEL:

Q When was the last day that you worked for the Texas-Mexican Railway Company in February of 1976?

A Approximately February the 23rd, '76, more or less.

Q Have you worked since then?

A No, sir, I haven't.

MR. LIDDELL: Your Honor, I'd like to object. So far we have had about five questions that were asked and answered on direct.

THE COURT: Overruled.

BY MR. RANGEL:

Q Generally, Mr. Lozano, what have you been doing since February of 1976, at home?

A I have just been — I have just been around the house with my boys, showing them how to mow the lawn, cut the gras, get all of the weeds out of the rose bushes, and this and that. I have to show them, because they usually don't like it or don't know how.

Q Have you done any exercises since then, Mr. Lozano?

A Yes, sir, I have done some exercises.

MR. RANGEL: Pass the Witness, Your Honor.

THE COURT: The Witness has been passed. Any redirect?

REDIRECT EXAMINATION

BY MR. LIDDELL:

Q Rudy, with regard to when you saw Dr. Mata, I believe that was 1967; is that correct?

A I believe so, sir.

Q All right. When you went to Dr. Mata, where did you complain of pain? Where did you have problems?

A My left leg was hurting.

Q Did you have any pain in your back?

A No, sir, just my leg.

Q Did you complain to Dr. Mata of any pain in your back?

A No, sir. My left leg was hurting.

Q All right. Now, Rudy, after you saw Dr. Mata, did you go back to work for the Texas-Mexican Railway?

A Yes, sir, I did.

Q All right. Did Dr. Mata do any surgery?

A No, sir, he didn't.

Q Did he send you to any other physician to have surgery done?

A No, sir, he didn't.

Q Rudy, when you returned to work, did you perform the same duties that you had performed prior to that?

A Yes, sir.

Q All right. Rudy, with regard to the ties, the space between the ties, I believe in response to one of Mr. Rangel's questions you mentioned something about the ties loosened up when you were releasing them. Would you explain to the Court and to the jury the exact step by step process that must be done in order to remove one of these ties?

A Yes, sir. In order to remove a tie, you loosen the spikes of the ties beside the one that you are going to remove, and then of course you take out the spikes and the old tie that's to be removed, and jack it up, and the ties — they move, because they are not — once you pick up the rail, the spike isn't real tight to

the tie and the rail. They have got a tendency — once you pick up the rail, the tie is a little wobbly all the time.

Q You mentioned in the course of explaining that you have to jack something up, what is it — are you using a jack to do something with there?

A We have to use a jack, sir, to pick up the rail.

Q All right. Do you put the jack under the rail?

A Yes, sir.

Q All right. And then — do you jack the rail up with that jack?

A Yes, sir, we do.

Q All right. I believe you testified that you loosened the spikes also?

A Yes, sir.

Q All right. What are the ties like then once you have done all of this?

A I beg your pardon?

Q What are the ties like once you have don all of this, as far as their stability?

A They are very wobbly.

Q Now, Rudy, is there any question in your mind that after you fell, that your leg went down between those ties?

A Yes, sir, it was.

Q All right. Now, presumably for your leg to end up between the ties, your foot had to go through there too; is that correct?

A Yes, sir, of course.

Q Rudy, were all of the ties on the bridge that day wet?

A All of the ties were wet, yes, sir.

Q Now, Rudy, Mr. Rangel asked you some questions relating to whether you looked down at the tie on which you slipped. I think he asked you to imagine yourself carrying a five foot claw-bar, and that you were walking on ties that had mud on them. Now, when you're walking on a bridge like this, do you walk along holding a claw-bar five feet in length staring down at the ground?

A You usually stare a little bit ahead of you.

MR. LIDDELL: I have no further questions.

RECROSS EXAMINATION

BY MR. RANGEL:

Q Mr. Lozano, the specific tie on which you slipped, do you recall whether or not that particular tie was loose?

A I do not recall, sir.

MR. RANGEL: No further questions.

THE COURT: Anything further?

MR. LIDDELL: No, Your Honor.

THE COURT: You will be excused. You may step down.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. LIDDELL: Your Honor, at this time we would like to introduce into evidence the answers to interrogatories submitted to the Defendant as they relate to the Plaintiff's past earnings and future wage increases by contract.

THE COURT: Do you want to read them into the record?

MR. LIDDELL: Yes, Your Honor, I would like to read them into the record, and also put them into evidence — submit them into evidence for the jury to take as an exhibit.

THE COURT: Well, I believe that the proper procedure is just to read them into evidence.

MR. LIDDELL: Very well, Your Honor.

These are Defendant's Answer to Interrogatories propounded by the Plaintiff. We make particular reference to Interrogatory No. 22. That interrogatory says: "Has there been any wage increases since the date mentioned in the preceding interrogatory that would inure to Plaintiff's benefit provided he were now employed with the Defendant? If so, state the amount of such increase."

The answer is: "Wage increases as follows: January 1st, 1975, five dollars and fifty-three cents per hour; October 10, 1975, five dollars and eighty-one cents per hour; January 1st, 1976, five dollars and ninety-three cents per hour; April 1st, 1976, five dollars and ninety-eight cents per hour; January 1st, 1976, six dollars and ten cents per hour. cost of living adjustment: July 1st, 1976, six dollars and twenty-two cents per hour."

Your Honor, in addition to that, we would like to place in the record the answer to Interrogatory No. 20. The interrogatory stated: "Was Plaintiff paid on an hourly or other basis to the last day worked for Defendant prior to receiving alleged injuries made the basis of this lawsuit, and please furnish that pay rate." The answer was: "Yes, five dollars and three cents per hour."

Interrogatory No. 21 states: "Please furnish the gross annual earning of Plaintiff during the calendar years 1973, 1974, 1975, and 1976." By way of answer to that interrogatory, the Plaintiff has stated: "See attached exhibit" — I mean, the Defendant stated: "See attached Exhibit D." Attached Exhibit D, Your Honor, is copies of Mr. Lozano's wage and tax statements, commonly referred to as W2 form, reflecting 1973, ten thousand one hundred and eighty-one dollars and sixty-nine cents; 1974 earnings of eight thousand forty-six dollars and eighty-nine cents; and 1975 is blank.

Your Honor, iwth regard to evidence as to future wage loss, the Plaintiff asked the Defendant Interrogatory No. 23. That interrogatory: "Is there a contract now in existence between Defendant and any organization representing employees in Plaintiff's job classification which affects the rate of pay in the future for Plaintiff or other employees in Plaintiff's job status, and if so, furnish those changes as provided by said contract." The Defendant stated: "See attached Exhibit E regarding future wage increases."

I'd like to offer into evidence Exhibit E attached to those interrogatories, which a portion of which reflects that for a carpenter, the increases effective on the 1st day of January, '77 —

THE COURT: Are you offering that into evidence?

MR. LIDDELL: I beg your pardon, Your Honor, yes, Your Honor, I would like to offer these into evidence.

MR. RANGEL: Beg your pardon?

THE COURT: He wants to offer the contract.

MR. LIDDELL: Not the contract, merely the exhibit attached to the answers given by Defendants to these interrogatories.

MR. RANGEL: May we approach the Bench, Your Honor?

THE COURT: Sure.

(Wherein, the following discussion was held at the Bench outside the hearing of the jury:)

MR. RANGEL: Can we stipulate that this may be part of the record instead of offering them into evidence?

THE COURT: Pardon?

MR. RANGEL: Can we stipulate to attach the exhibit attached to the interrogatories as part of the record, but not admitting them into evidence?

THE COURT: Well, this is just like a deposition. If you have a contract, I guess that's a state right, isn't it? What are you going to do? Are you going to agree to the admission?

MR. LIDDELL: I'm not interested in the contract, but merely the attached exhibits which reflect the past wage earning ability, the wage earnings in the past and the future wage earnings.

THE COURT: Any objection? You have seen that exhibit, you furnished that to him.

MR. RANGEL: But any records of the contract — the contract is not before us.

MR. LIDDELL: I'm not admitting the contract.

MR. RANGEL: The exhibits without the contract is fine.

THE COURT: Okay.

(Close of discussion at the Bench.)

THE COURT: The exhibit is admitted. You have stated that there is no objection to the exhibits being admitted. They will be admitted.

MR. LIDDELL: Your Honor, at this time the Plaintiff calls the next witness.

THE COURT: Calls who?

MR. LIDDELL: May we call our next witness, Your Honor?

THE COURT: Surely.

MR. LIDDELL: We'd like to call Mrs. Lozano.

(Wherein, Mrs. Rodolfo Lozano was called to the stand and testified on behalf of the Plaintiff, such testimony not requested to be transcribed by the Reporter.)

MR. LIDDELL: Your Honor, may we call our next witness?

THE COURT: Surely.

MR. LIDDELL: I'd like to call Mr. Roberto Trevino.

(Wherein, the Court Clerk swears in the Witness, Roberto Trevino.)

ROBERTO TREVINO

was called as the next witness on behalf of the Plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. LIDDELL:

Q Roberto, would you state your full name, please.

A Roberto Trevino.

Q Roberto, who are you presently employed by?

A Sir?

Q Who do you presently work for, Roberto?

A Tex-Mex.

Q Roberto, do you live here in Laredo?

A No, sir.

Q Where do you live?

A I live in Austin.

Q Roberto, were you working for the Texas-Mexican Railway on September 23rd, 1974?

A Yes, sir.

Q Roberto, were you working with Mr. Rudy Lozano, the Plaintiff in this case, on that date?

A Yes, sir.

Q Roberto, did you observe Mr. Lozano sustain an injury on that date?

A Well, he fell down. That's what I know.

Q Roberto, could you tell us the circumstances and the facts surrounding his fall, what — do you recall what he was doing at the time he fell?

A Well, he was — when we started working on that rail and I needed a claw-bar, and he turned around and he slipped between the ties.

Q Did his leg go in between the tie, Roberto?

A Yes, sir.

Q Roberto, on that day was it raining when you were working?

A It was misting, not heavy rain, you know, must misting.

Q roberto, as best you recall, was there mud on the bridge itself?

A Well, I say it was slicky.

Q I'm sorry. Can you repeat that?

A Slicky.

Q Roberto, have you had occasion to have to work in the rain before when you worked for Tex-Mex Railroad?

A Well, actually we use raincoats, you know, when it's raining.

Q Let me rephrase my question.

Have you worked in the rain before on your job?

A Yes.

Q Have you worked on a bridge in the rain before?

A Well, when it's raining too heavy, you can't work, you know. It's kind of dangerous, you know.

Q All right. Roberto, why wouldn't you work on a bridge when it's raining too heavily?

A Well, I say it's kind of, you know, you might get hurt or something.

Q Okay. Roberto, how many years have you worked for the Texas-Mexican Railway?

A Five years.

Q Roberto, on September 23rd, 1974, was there other work that the work gang could have been doing other than working on that bridge?

A Well, actually, yes, but when we got something scheduled to do, we're supposed to do that job for that day.

Q Roberto, was there any kind of emergency that required that bridge to be worked on that day, or was it really scheduled maintenance?

A No, it was just regularly scheduled that we had to do it.

Q Roberto, can you tell us what other jobs could have been done by the crew on that day?

A No, sir.

Q All right. Was there some work that could have been performed on some of the nine buildings owned by the Texas-Mexican Railroad?

A Well, actually, yes, but there wasn't any open for that on that day, you know. We were supposed to go ahead and work on that bridge.

Q All right. Roberto, who told you you were supposed to go ahead and work on that bridge? Who did you get you instructions from, Roberto?

A Oh, from the foreman that we got.

Q Who was the foreman that day, Roberto?

A Lalo Gonzalez.

Q Roberto, do you follow the instructions the foreman gives you?

A Yes, sir.

Q Roberto, if you do not follow the instructions that the foreman gives you, what can happen to you?

A I don't know.

Q Roberto, have you ever told a foreman that you're not going to do the job that he told you to do?

A No, sir.

Q Roberto, how many years did you work with Rudy Lozano?

A Well, I'd say about three years.

Q Did you have an opportunity to observe Rudy fairly regularly during that period of time?

A We worked together.

Q Did you feel like Rudy was a good fellow to work with?

A Yes, sir.

Q Did he carry his share of the work? Did he do his job?

A Yes, sir.

Q Did you ever know Rudy to not follow the instructions that he was given?

A No, sir.

Q Roberto, do you know where the mud on the ties on that bridge came from?

MR. RANGEL: Your Honor, we'd like to object to the question ast there being no predicate that there was mud.

THE COURT: Sustained.

BY MR. LIDDELL:

Q Let me ask you again, Roberto: on that bridge, on September 23rd, 1974, was there mud on the ties on the bridge?

A It was slicky.

Q It was slick?

A Uh-huh.

Q All right. What made it slick, Roberto?

A Well, it had been, like I say, misting, you know, a little rain, you know.

Q Uh-huh. Did you see any mud on the bridge?

A Well, actually, you know, when you get up from the ground you probably have a little mud, but not much.

Q All right.

THE COURT: You mean mud from your boots or what?

THE WITNESS: Yes, sir, the boots.

BY MR. RANGEL:

Q Did you have mud on your boots, Roberto?

A I sure don't remember, you know.

Q All right. Roberto, perhaps I can assist you. Roberto, I'd like to ask you to examine this document dated February 28th, 1976, and ask you if you have seen that before?

MR. RANGEL: Your Honor, I'd like to object to that. He's trying to impeach his own witness.

THE COURT: It's perfectly permissible under the rules.

MR. LIDDELL: Under the Federal Rules of Evidence, Your Honor, that's correct.

BY MR. LIDDELL:

Q Do you recognize that statement, Roberto?

A Uh-huh.

Q Roberto, is this your signature on the statement here?

A Uh-huh.

Q All right. Roberto, to the best that you can recall, did Rudy Lozano finish work that day?

A Yes, sir, he finished.

Q Roberto, where did the mud on your shoes come from, do you recall?

A We had some mud on the boots that come from the ground.

Q Roberto, did you walk down under the bridge at any time?

A No, sir.

Q All right. Did you get the mud on your boots from on the ground up at the end of the bridge?

A At the end of the bridge.

Q Now, did you walk out on the ties yourself?

A No, sir. When we went — when we got in there, we just went up to the bridge, you know.

Q That's what I say, Roberto, in the course of your duties that day, did you go out onto the bridge?

A Uh-huh.

Q Roberto, let me repeat my question. In — as you did your job that day —

A Yes, sir.

Q — did you walk out on the bridge?

A Yes, sir.

Q Yourself, you did?

A Uh-huh.

Q All right. Roberto, were there spaces in the bridge where ties had been taken out?

A No, sir.

Q Did you observe any ties being replaced that day?

A No, I don't remember, sir.

Q You don't recall?

A I don't recall.

Q All right. Roberto, the statement I showed you a moment ago, I'd like to show you again. It says, "I was working next to Rodolfo Lozano."

MR. RANGEL: Your Honor, I'd like to object to any reference to an exhibit that has not been offered into evidence.

THE COURT: He can use it to refresh his memory.

BY MR. LIDDELL:

Q Does that not state here, Roberto, "I was working next to Rodolfo Lozano, and we were replacing ties on a bridge near Milepost 78.80." Isn't that what the statement says?

A Yes.

Q All right. Roberto, a short time ago during the recess, did you have occasion to talk to Mr. Buitron?

A He was going out when I was going to the coffee shop.

MR. LIDDELL: Your Honor, at the present time we'd like to offer into evidence the signed statement of the Witness, Mr. Trevino.

MR. RANGEL: For what purpose? Your Honor, for what purpose is it being offered?

THE COURT: I don't know.

MR. LIDDELL: It's being offered as proof of the earlier statement that the man made regarding the fact that they were replacing ties.

THE COURT: He already stated that.

MR. RANGEL: I object to it because he already stated that.

MR. LIDDELL: We withdraw the offer, Your Honor.

THE COURT: All right.

BY MR. LIDDELL:

Q Roberto, you do remember giving this statement, do you not?

A Yes, sir.

Q All right. Roberto, the statement is dated February 28th, 1976. As best you recall, is that the date on which you gave this statement?

A I don't recall right now.

Q You do recall giving the statement, though, this written statement.

A Yes, sir.

THE COURT: Of '76, you say?

MR. LIDDELL: Beg your pardon. 1976 — February 20th, 1976.

Roberto, I have no further questions. Thank you.

CROSS EXAMINATION

BY MR. RANGEL:

Q Mr. Trevino, there was a lot of reference to the statement. Did you write this statement that was given to you?

A Sir?

Q Did you write it yourself?

A No, sir.

Q Who wrote it?

THE COURT: I don't think that has any relevance.

MR. RANGEL: May we approach the Bench?

THE COURT: No, let's move on.

MR. RANGEL: Pardon me?

THE COURT: Move on. I think we have done enough to the statement.

MR. RANGEL: Your Honor, we're going to establish that he does not really understand the statement, and that it was written by someone else and that he didn't read it, Your Honor.

MR. LIDDELL: Your Honor, the Witness has already testified that —

THE COURT: He already testified that — as to what the statement stated. Let's lay that at rest. Let's move on, Counsel.

BY MR. RANGEL:

Q Mr. Trevino, on this particular day, September 23rd, 1974, when the accident occurred, do you recall what you were doing on that bridge, you individually?

A We were going to realign that bridge and probalby repair those ties. In the meantime, during that time we were going to give the line to that rail, and we were supposed to get some of those spikes out. Then I needed a crowbar. Old Lozano said, "I'll get it for you." At that time he turned around, and that's when he fell down.

Q Did Mr. Lozano fall down as he turned around to go get the claw-bar?

A I guess it was when he turned around. He fell in between the ties.

Q He fell before he actually got to the claw-bar?

A Yes, sir.

Q Where was Mr. Lozano standing right before he fell?

A Well, he was next tome — Joe and me and then Mr. Lozano.

Q When you say "Joe" you mean Joe Avalos?

A Yes, sir.

Q Were the three of you standing facing a rail?

A Yes, sir.

Q That morning what kind of work were other members of the crew to do if you, Mr. Avalos and Mr. Lozano were to be working on top of the bridge, what were the other members of the crew doing?

MR. LIDDELL: Objection, Your Honor. He's beyond the scope of direct examination.

THE COURT: Overruled.

THE WITNESS: They were — the rest of the men were working under the bridge.

BY MR. RANGEL:

Q So it was your responsibility along with Mr. Avalos and Mr. Lozano to work on top of the bridge, to work on the bridge that day?

A Yes, sir.

Q And the other members were working underneath the bridge?

A Yes, sir.

Q Do you recall whether the men that were working on top of the bridge had to go underneath the bridge?

A Not necessarily.

Q I'm sorry?

A Not necessarily.

Q Because the work to be done underneath the bridge was to be done by other members of the crew?

A Yes, sir.

Q After you got to the top of the bridge that morning, which was — strike that.

After you got to the top of the bridge that morning, do you recall stepping down anywhere for any reason before the accident?

A No, sir.

Q Mr. Trevino, how would you describe the misty weather? What do you mean by that that morning?

A Well, misting means when it's raining, not heavy, but it's still raining, you know, slow, you know. It's called misting.

Q Were you wearing your raincoat?

A No, sir.

Q Do you recall whether before Mr. Lozano was injured any ties had been replaced?

A No, sir.

Q You do not recall, or no ties were replaced?

A No.

Q Were any ties replaced before Mr. Lozano was injured?

A No, sir.

Q Do you recall seeing the tie on which Mr. Lozano slipped after he slipped?

A No.

Q Do you recall seeing any mud around where Mr. Lozano slipped?

A No, I don't remember.

Q Do you recall whether any of the ties around the area where Mr. Lozano slipped, whether they were wet?

A As I say, it was slicky.

Q What do you mean by "slicky"?

A Well, kind of damp or, you know, it had been misting, you know. It was a little damp on top. That's what I call slicky.

MR. RANGEL: All right, sir. No further questions.

THE COURT: Any redirect?

MR. LIDDELL: Nothing further, Your Honor.

THE COURT: You will be excused. You may be excused. You may step down.

MR. LIDDELL: Your Honor, at this time the Plaintiff would like to call Mr. Jose Avalos. However, Mr. Avalos would need to testify in Spanish.

THE COURT: Is Beatrice here?

MR. LIDDELL: May I approach the Bench a minute, Your Honor?

(The following discussion was held at the Bench outside the hearing of the jury:)

MR. LIDDELL: We did not anticipate getting ahold of Mr. Avalos this afternoon, and your interpreter spoke to me about whether or not we could reach Mr. Avalos today. That may be why she isn't here. If she's not available, it's my fault.

THE COURT: All right. No use getting sore aobut it. Shall we recess until tomorrow at 9:00 then?

MR. LIDDELL: That's fine.

MR. RANGEL: That's fine, Your Honor.

(Close of discussion at the Bench.)

THE COURT: We'll recess until 9:00 o'clock in the morning. I will again ask you now to discuss the case amongst yourselves or with anyone else at this time, and avoid any news media accounts. You're excused until 9:00 o'clock in the morning.

(Wherein, the Court was in recess until 9:00 a.m. March 2nd, 1977.)

THE COURT: Call your next witness.
MR. LIDDELL: I call Dr. Gustavo J. Riddle.

(Wherein, Gustavo J. Riddle, M.D. testified on behalf of the Plaintiff, such testimony not requested to be transcribed by the Reporter.)

MR. LIDDELL: Your Honor, at this time the Plaintiff calls Mr. Jose Avalos. Your Honor, we will need a translator.

JOSE AVALOS,

was called as the next witness on behalf of the Plaintiff, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified in Spanish through the Official Court Interpreter as follows, to-wit:

DIRECT EXAMINATION

BY MR. LIDDELL:

Q Joe, would you state your full name, please?

THE COURT: Why don't we use his last name, Counsel, out of respect.

MR. LIDDELL: All right.

BY MR. LIDDELL:

Q Mr. Avalos, would you state your last name, please.

A Jose Avalos.

Q Mr. Avalos, where do you live?

A Robstown, Texas.

Q Mr. Avalos, what is your age?

A I'm fifty-one years.

Q Mr. Avalos, are you presently employed by the Texas-Mexican Railway Company?

A Yes, I work there.

Q Mr. Avalos, how many years have you worked for the Texas-Mexican Railway?

A Almost thirty-four years.

Q Mr. Avalos, could you tell us the kind of job that you do for the Texas-Mexican Railway; what your job is.

A It's manual labor, fixing the ties, and nailing them, and setting them up straight.

Q Mr. Avalos, do you work on what is often referred to as the B&B crew?

A Yes, I do, on the bridge.

Q Mr. Avalos, were you working on a B&B crew on September 23rd, 1974?

A Yes.

Q Mr. Avalos, was it raining on that day?

A Yes, it was raining a little bit.

Q All right. Was the — was the bridge wet?

A Yes, it was wet.

Q Was there mud on the ties in the bridge?

A Not on the top part, but going up there was.

Q All right. Could you repeat that for me, please?

A Not on the top part of the bridge, but on the way up there was a lot of mud.

Q Would you ask Mr. Avalos to explain what he means by "on the way up"?

A Well, to go up to the bridge we had to go up the bridge on the side, there was mud, a lot of mud.

Q Did he get mud on his shoes that day?

A I probably did, but I'm not sure.

Q Mr. Avalos, was Rodolfo Lozano working with you that day?

A Yes, he was.

Q Mr. Avalos, could you tell us what the assigned job to do was that day?

A We had to nail some parts on the bridge and straighten some ties.

Q Mr. Avalos, do you recall whether or not you replaced any ties on that day?

A We did replace some ties, but I'm not sure if it was that day or before that.

Q Are the ties that they put in when they replace ties, are those new and freshly creosoted — excuse me — I beg your pardon. Mr. Avalos, are the ties you put in, are they fresly creosoted ties?

A They were already creosoted.

Q Mr. Avalos, when a new tie becomes wet, is it pretty slick?

A Yes, certainly.

Q Mr. Avalos, do you recall who was your foreman on that day?

A Lalo Gonzalez was the foreman.

Q Mr. Avalos, does the foreman tell the men on the gang what to do?

A Yes, that's correct.

Q Mr. Avalos, could you tell the jury what could happen if you don't do what you're told?

A We have to do what he says. If not, we have to obey the foreman.

Q Mr. Avalos, have you ever told the foreman you're not going to do what he says?

THE COURT: This is argumentative. Let's move on, Counsel.

MR. LIDDELL: All right, Your Honor.

BY MR. LIDDELL:

Q Mr. Avalos, do you know whether or not Mr. Lozano fell on the bridge on September 23rd, 1974?

A Yes, he fell down.

Q Did you see him fall?

A I saw him when he was down.

Q Mr. Avalos, when he was down, was his leg between the two ties?

A That's correct.

Q Mr. Avalos, have you worked with Rudy Lozano for a period of time?

A Yes, I have worked with him.

Q Is Mr. Lozano a good worker?

A Yes, sir.

Q Does Mr. Lozano carry his share of the work?

A Yes, he does his share.

Q Mr. Avalos, do you know what Mr. Lozano was doing just before he fell?

A I do not remember. The last thing I remember is saying, "I'm going to give you the crowbar," and then he was down.

Q Mr. Avalos, was there other work that could have been accomplished by the crew on that day?

A If the foreman wanted more work, we could have done more work.

Q All right. Mr. Avalos, I need to repeat my question. I don't mean necessarily more work, but different work. Was there something that could have been done other than working on that bridge?

A Yes. We could have — we could have done something else, but he didn't tell us to do anything else.

Q Mr. Avalos, have you worked on a bridge in the rain before?

A Yes, I have often worked on wet bridges.

Q Mr. Avalos, can you tell us how old the oldest man is that you know that's still working for the Texas-Mexican Railway in hard labor?

THE COURT: I don't see that's relevant. Move on.

MR. LIDDELL: We're trying to establish a work life expectancy through the Witness, by evidence of the ages of the men who are still working there that Mr. Lozano could have expected to work until that age except for the fact that he had suffered an injury.

MR. RANGEL: I think it's irrelevant, Your Honor.

THE COURT: Well, I'll allow the question.

THE WITNESS: There's a sixty-two year old man there.

BY MR. LIDDELL:

Q Is there anyone older than that?

A Older, you say?

Q Older.

A No, he's the oldest, sixty and sixty-three.

MR. LIDDELL: Pass the Witness.

CROSS EXAMINATION

BY MR. RANGEL:

Q Would you describe the rain on that morning of September 23rd, 1974, as misty?

A I can't really describe it. It was wet. It was misty.

Q How long was it misty that morning?

A I cannot tell you whether it lasted two or three hours. I really can't tell you.

Q But it did not last all day, did it?

A No, it was raining, but I can't say at what time it was over.

Q It was raining just a little?

A It rained a little bit, but it was wet.

Q What were — strike that.

What was to be done by the crew that morning on that bridge?

A We were seven workers.

Q Were different workers assigned different duties?

A Some were going to do one thing and the others were going to do another.

Q What were you going to do?

A I just went up the bridge to receive orders of what to do, whatever was needed, nails, or whatever.

Q Were there other members of that crew working with you on top of that bridge?

A Yes, we were three at the top of the bridge.

Q And isn't it a fact there were also other members of the crew assigned to work underneath the bridge?

A Yes, there were other ones below the bridge.

Q And isn't it a fact that the men who were working on top of the bridge were to work there and there only, and the men working underneath the bridge were to work there and there only?

A You're supposed to — the ones that are working on top of the bridge are supposed to be doing whatever work they are assigned on top of the bridge. The ones below the bridge are supposed to be doing whatever they are told to do, but if you need some kind of a tool, you have to go get it.

Q Isn't it a fact that on that morning you did not have to leave the bridge after you got on top of it for any reason?

A If I needed a tool, I had to go down, and if I needed to get a drink of water, I had to go down and get a drink of water.

Q Isn't it a fact that you did not go down that morning before the accident?

A We did have to go down, but I don't remember what for. The tools did not come up to us. We had to go down and get them.

Q Did you in fact get down?

THE COURT: Let's go on to something else. I'm starting to hear the same question over and over. I'm tired of hearing the same question over and over.

BY MR. RANGEL:

Q Was there any mud on the bridge?

THE COURT: That wasn't the question. The question, "Was there any mud on the bridge?" Not on top.

(Wherein, the Interpreter retranslates the question.)

THE WITNESS: Below the bridge there was mud. On top of the bridge the ties are creosoted, and they are clean.

BY MR. RANGEL:

Q So isn't it a fact that on that morning there was no bridge — I'm sorry — no mud on the ties on the bridge?

A I do not remember if there was mud on the bridge. I remember that there was mud below the bridge.

Q What were you doing just prior to the time that Mr. Lozano fell?

A I was nailing something around there, and then he was taking the crowbar when he fell.

Q Where — were you standing facing a rail just prior to Mr. Lozano falling?

A I was facing the rail when I saw him fall.

Q Was Mr. Lozano also facing the rail just prior to his falling?

A I can't tell you that. He turned around to get the crowbar, to loosen the nails.

Q Is it your testimony that as Mr. Lozano turned around to get the claw-bar, he fell?

A Yes.

Q Is it your testimony that he fell before he got the claw-bar?

A I can't tell you. He was already down when I saw him.

Q Do you recall — strike that.

Was the space between the ties which Mr. Lozano's leg fell, the regular space that's between ties?

THE INTERPRETER: Was the space regular?

MR. RANGEL: Strike that and let me rephrase it.

BY MR. RANGEL:

Q Were there any gaps between the ties other than the regular space where Mr. Lozano fell?

A It was a regular gap.

Q Did you continue working that day?

A I don't remember. I remember we worked there all day.

Q Did you have any problems working on the bridge?

A No, we just had to work.

Q Were the ties on the bridge that day unusually slippery?

A Yes.

Q Have you worked in the rain before?

A Yes.

Q Have you worked when it's been raining very hard?

A Yes, we have worked when it's been raining hard. If they tell us to stop, we stop; if not, we keep on.

Q Do the ties, whenever there's a light rain, get as slippery as when there is heavy rain?

A When it's raining lightly, it's slippery. When it's raining hard, it's also slippery, and even when the sun it out, it's slippery, because ther's oil coming out from the ties, and that makes them slippery.

Q What do you have to do to avoid slipping on the ties?

A You have to step on it. There's nothing to do about it.

Q Do you have to be careful when you're working and walking on the tics in order to avoid falling?

A You do the best you can. If not, you fall down.

MR. RANGEL: Pass the Witness.

MR. LIDDELL: No questions.

THE COURT: You may be excused.

(Wherein, the Plaintiff concluded its testimony with the reading of two depositions, after which the Defendant put on its testimony, all of which was not requested to be transcribed by the Reporter.)

MR. RANGEL: The Defendant rests.

THE COURT: What announcement does the Plaintiff have? Does the Plaintiff close?

MR. LIDDELL: The Plaintiff closes, Your Honor.

MR. RANGEL: We'd like to make a motion outside of the presence of the jury.

THE COURT: I will excuse the jury for a moment. I'm going to excuse you just a moment. You can go to the Jury Room, and then I'll bring you back.

(Wherein, the jury was excused from the Courtroom, and the following was held outside of their hearing:)

MR. RANGEL: Your Honor, at this time the Defendant Texas-Mexican Railway Company would like to move for a directed verdict pursuant to Federal Rules of Procedure on the grounds — to support that motion we will show the Court that: number one, the Plaintiff has totally failed to introduce evidence to support their allegation of negligence.

Specifically, for example, they made reference in their complaint to the need for handrails. The evidence shows that the handrails had not been used. With specific reference to planking, the evidence showed that plankings would not have been used. With specific reference to catwalks, again the evidence shows that the catwalk was beyond the use of the Planitiff.

The Plaintiff alleged that the ties were slippery because of a combination of factors: mud, creosote, and raining. The evidence did not establish that we had creosote on the ties, particularly on the tie on which he slipped. The evidence did ont establish that there was any mud on the ties.

THE COURT: Well, let me ask you: suppose there were rain, mud and creosote on the ties, suppose that the ties were wet. Is it your contention that then you would be liable if it was raining out there, that people couldn't —

MR. RANGEL: No, sir. Your Honor, you're anticipating one of our — another of our contentions. In *Raudenbush v. Baltimore & Ohio Railway Company*, 160 Fed(2d) 363, wherein the general rule of law stated: It's a general rule of wide acceptation that since railroad companies have no control over the changes of weather or climatic ocnditions, that there's no liability for injuries resulting from the mere existence of ice or snow, disconnected from other circumstances.

THE COURT: I was going to ask you: you're not stating that the Texas-Mexican Railway owes a duty to this man to keep him out of the rain?

MR. RANGEL: No, sir, we're not saying that.

THE COURT: In other words, even if it were wet and slippery as alleged, your position is that that was not a violation of your duty to the Defendant, therefore, it wasn't negligence to have him out there. The trains run in the rain or whatever.

MR. RANGEL: We state that there was no reach of any duty to the Plaintiff in this case. And in fact —

THE COURT: Your position is not an insurer. The only way you can be held liable, as I understand it, is if there's some showing of negligence. Even if he were contributory negligent, it would be reduced by a percentage. You would have to show some act of negligence.

MR. RANGEL: Yes, Your Honor. There's nothing in the record to show any act of negligence on the part of the Railroad. There's nothing in the record to reflect any duty neglect on the Railroad in this record. There's nothing in the record to establish a standard in this situation — that is, there's nothing in the record to show that what the Railroad did on this particular railroad on this particular day, that it wasn't what an ordinary railroad would have done under the same or similar circumstances. The record is devoid of all evidence to support the allegations that the Plaintiff has made in his complaint. We are entitled to a verdict as a matter of law.

THE COURT: What do you say?

MR. LIDDELL: Your Honor, by way of resistance to the Defendant's motion, we would cite the case of *Rogers vs. Missouri-Pacific*, 352 U.S. 500.

THE COURT: What does it say?

MR. LIDDELL: Your Honor, I would say that the Plaintiff's presentation is not subject to a motion for directed verdict, as there are a number of fact questions, and those fact questions must be submitted to the trier of fact.

THE COURT: What fact question?

MR. LIDDELL: Your Honor, there's a question as to whether the negligence — whether the acts alleged in the complaints in our petition, that is the working of a person in an unsafe place in breach of the —

THE COURT: The thing there is that there was no evidence that that was uncommon. They ordinarily work in the rain. In other words, if this is not something that's uncommon, that doesn't happen all the time —

MR. LIDDELL: That's true, Your Honor. However, the fact that a particular practice has continued over a particular period of time does not mean it isn't negligent.

THE COURT: Are you going to tell me then that trains have to stop runnin when it rains?

MR. LIDDELL: No, Your Honor, that's not what we said. Our point is that the people should not — initially, Your Honor, the statute places on the Railroad an indelible duty to provide their employees a safe place to work. Your Honor, they placed a man in a position, put him in a work area that was unsafe.

THE COURT: But the thing is that place is not safe any time. Any time you're on top of the bridge, any time you get a man off of the ground, that's not safe. People do that for a living all the time.

MR. LIDDELL: Your Hoor, there's no question that the work must be performed. It's the conditions under which the work must be performed that creates the negligence question. The question to the jury is: whether to work this man under those circumstances was failing in their indelible duty to provide a safe place to work.

Additionally, the standard of whether there's been a jury issue presented in the evidence is set forth in *Rogers vs. Missouri-Pacific.*

THE COURT: What was the fact situation in the Rogers case?

MR. LIDDELL: Beg your pardon?

THE COURT: We're talking about facts.

MR. LIDDELL: Your Honor, I was making reference to the fact that Rogers establishes the proper standard —

THE COURT: I don't care about what the standards are. I wand to know what the facts were.

MR. LIDDELL: Your Honor, I can answer for you in just a moment.

Your Honor, in that case the Plaintiff was an employee of the Missouri-Pacific Railroad, and he was burning weeds at the site of the roadbed. A train approached, and he followed the instructions of his supervisor to move back away from the track and to stand by the track to watch for hot boxes on the cars. The draft produced by the train increased the intensity of the fire in the weeds.

THE COURT: There you have the train company doing something.

MR. LIDDELL: Your Honor, we have the company doing something here as well.

THE COURT: They're putting him out in the rain, is all I can see.

MR. LIDDELL: No, Your Honor. They have breached their duty to provide a safe place to work in, allowing him to work in a place which presented an unsafe condition, that it was wet, it was raining, it was muddy, it was slippery, all of

these facts. When you work a man in the rain on the bridge under all these conditions, it makes an accident a foreseable event.

THE COURT: This was done all the time and was part of his job.

MR. LIDDELL: Yes, Your Honor, it was done all the time. But the fact it was done before or will be done since does ont change the fact question of whether the Railroad was negligent even in the slighest degree.

THE COURT: You're saying that the negligence of the Railroad was putting him out there on a rainy day or a misty day?

MR. LIDDELL: No, Your Honor. That was one of the elements of the negligence of the Railroad. The additional elements of negligence of the Railroad, as we have alleged in our petition, was in failure to provide him with planking to walk over this surface.

THE COURT: The planking would have been outside of the track line.

MR. LIDDELL: No, Your Honor. We have adduced that a 1 by 12 piece of planing could be laid down without any difficulty on the area that the man was working on. It would have been no difficulty to —

THE COURT: I think that the testimony was somewhat different, as I recall it. The planking would have gone outside of the rail, and he was in between the rails when he fell.

MR. LIDDELL: Your Honor, there was testimony that planking, as it is referred to on a bridge, is indeed located outside of the rail.

THE COURT: As far as the mud is concerned, they provided a foot scraper, didn't they?

MR. LIDDELL: Yes, Your Honor. There was a foot scraper present, and the Plaintiff testified as best he recalled, he scraped the mud from his feet.

THE COURT: I don't see enough here to send this case to the jury. I'm going to grant the motion for directed verdict.

MR. LIDDELL: Your Honor, we have also — if I may further state, we have also produced evidence that there was

additional places in which the labor could have been performed. They could have worked at other locations, safer locations, on that particular day.

THE COURT: I just don't see it, because this is something that has to be repaired. If the bridge is not safe, it's probably going to create more havoc in not repairing the bridge at the proper time than you would by working some other place. I grant the motion for instructed verdict.

MR. LIDDELL: Your Honor, the matter has been fully tried at the present time, and in light of the issues involved and the standards under the Federal Employers Liability Act established by the Supreme Court, would it not be favorable judicially to allow the factual questions to be resolved by the jury?

MR. RANGEL: Your Honor, there's no factual questions to be found by the jury. As a matter of law your ruling is correct.

THE COURT: I have already ruled. You can take it up.

MR. LIDDELL: I beg your pardon?

THE COURT: I have already ruled.

Bring the jury in.

(Wherein, the jury is returned to the courtroom.)

THE COURT: You don't have to take your seats in the jury box, just stand there.

Ladies and gentlemen of the jury, you will be excused at this time. I have granted a motion for instructed verdict at this time, and you will be excused. Thank you so much for your presence.

(Wherein, the jury leaves the courtroom.)

THE COURT: If you will draft a judgment in accordance with what has been done. That's all.

* * *

IN THE UNITED STATES DISTRICT COURT:
FOR THE SOUTHERN DISTRICT OF TEXAS:

I, CHRIS CARPENTER, Official Stenograph Reporter for the United States District Court, Southern District of Texas, Corpus Christi Division, do hereby certify that the above and foregoing is a true and complete transcript of excerpt of

proceedings had on the trial of the above styled and numbered cause, before the Honorable Robert O'Conor, Jr., Uited States District Court Judge, beginning on March 1, 1977.

WITNESS MY OFFICIAL HAND at my office in Laredo, Webb County, Texas, on this, the ____ day of June, A.D. 1977.

CHRIS CARPENTER
Official Court Reporter
Federal Courthouse Building
Laredo, Texas

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 10 1977
V. BAILEY THOMAS, CLERK
DEPUTY

APPENDIX B (1)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

RODOLFO LOZANO	§	
VS.	§	
THE TEXAS MEXICAN RAILWAY	§	C. A. NO.
COMPANY	§	76-L-22

JUDGMENT

This cause came on for trial before the Court and a jury on the 28th day of February, 1977, and the parties appeared in person and by their attorneys. The Court and jury proceeded to hear evidence. At the close of the evidence on March 2, 1977, Defendant, The Texas Mexican Railway Company, moved for a directed verdict pursuant to Rule 50, Federal Rules of Civil Procedure; and it appearing to the Court and the Court finding such motion should be granted:

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendant's Motion for a Directed Verdict be and it is hereby granted, and Plaintiff, Rodolfo Lozano, shall take nothing from Defendant, The Texas Mexican Railway Company.

Costs of court are assessed against Plaintiff, Rodolfo Lozano.

SIGNED this the 10th day of March, 1977.

/s/ ROBERT O'CONOR, JR.
United States District Judge

A TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, CLERK
by [signature]
Deputy Clerk

BEST COPY AVAILABLE

APPENDIX B (2)

Rodolfo LOZANO, Plaintiff-Appellant,

v.

The TEXAS MEXICAN RAILWAY COMPANY, Defendant-Appellee.

No. 77-1803

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Dec. 15, 1977.

Action was brought under the Federal Employers' Liability Act claiming that injury was caused by railroad's negligence. The United States District Court for the Southern District of Texas at Laredo, Robert O'Conor, Jr., directed verdict for railroad at close of railroad employee's case, and employee appealed. The Court of Appeals held that evidence presented did not provide any factual basis for finding of negligence on part of railroad.

Affirmed.

Master and Servant 278(7)

Where safety devices would have been of no assistance to railroad employee, who while performing routine repairs on bridge fell from standing position and landed on his buttocks causing injury to his back, injured employee and his witnesses could not remember any mud where he slipped and fell, nothing proved that he slipped on freshly creosoted tie, and there was no evidence showing that light mist made tracks unusually slippery, there was no factual basis for finding of negligence on part of railroad. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

William T. Liddell, David Q. Haag, Houston, Tex., for plaintiff-appellant.

Elmore H. Borchers, Laredo, Tex., Jorge C. Rangel, Corpus Christi, Tex., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM:

On September 23, 1974, Rodolfo Lozano, while performing routine repairs on a bridge owned by his employer, The Texas Mexican Railway Company, fell from a standing position and landed on his buttocks causing injury to his back. Lozano brought this action under the Federal Employers' Liability Act, claiming that the injury was caused by his employer's negligence. At the close of plaintiff's case, the district court directed a verdict for the Railway. Lozano contends the district court erred in not permitting a jury determination of the alleged acts of negligence by defendant.

The evidence presented during plaintiff's case did not provide any factual basis for a finding of negligence on the part of the employer. Although Lozano claimed that the defendant failed to provide proper safety equipment, the witnesses agreed that and safety equipment such as planking or handholds would have been placed on the outside of the rails. Since Lozano fell in the center of the rails, these devices would have been of no assistance. While Lozano testified that mud existed on some of the ties, he could not remember any mud where he slipped. Roberto Trevino and Jose Avalos, both witnesses for the plaintiff, stated they

could not recall any mud where Lozano fell. Similarly, nothing proved that Lozano slipped on a freshly creosoted tie.

The only fact upon which a jury could find that the working area was unsafe was that the Railway required that the bridge be repaired while a light mist was falling. However, continuing repairs under such weather conditions is a common practice in the industry and has not been considered negligence. *See Detroit, T. & I. R. Co. v. Banning*, 6 Cir., 1949, 173 F.2d 752. In Lozano's situation there was no evidence showing that weather conditions made the tracks unusually slippery. The employer also attempted to protect against the development of any dangerous condition by providing a foot scraper to remove any mud. Under these circumstances the record is devoid of any facts upon which the jury could return a verdict for Lozano. Hence, the district court was correct in directing the verdict.

AFFIRMED.

Barbara BORNSTEIN, as Trustee for National Indemnity Company of Omaha, Plaintiff-Appellee,

v.

CITIZENS NATIONAL BANK OF ORLANDO, now known as Pan American Bank of Orlando, N.A., Defendant-Appellant.

No. 75-2965.

United States Court of Appeals,
Fifth Circuit.

Dec. 15, 1977.

On appeal of the judgment of the United States District Court for the Middle District of Florida, George C. Young, Chief Judge, the Court of Appeals certified questions to the Supreme Court of Florida, including, whether the assignment of a

nonnegotiable certificate of deposit as security for the purchase of a bond was a transfer entitled to secured transaction treatment under the Uniform Commercial Code, whether Florida law invalidated a prohibition against assignment without consent of the bank, whether the prohibition against assignment without the consent of the bank was valid and enforceable against a third-party assignee, and whether the bank was entitled to set off the funds represented by the certificate of deposit.

Questions certified.

Federal Courts 392

Questions would be certified to Florida Supreme Court, including, whether assignment of nonnegotiable certificate of deposit as security for purchase of bond was transfer entitled to secured transaction treatment under Uniform Commerical Code, whether Florida law invalidated prohibition against assignment without consent of bank, whether prohibition against assignment without consent of bank was valid and enforceable against third-party assignee, and whether bank was entitled to set off funds represented by certificate of deposit. West's F.S.A. §§679.101 et seq., 679.318(1, 4).

Winifred J. Sharp, Orlando, Fla., for defendant-appellant.

Hugh M. Palmer, Orlando, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JONES, COLEMAN and TJOFLAT, Circuit Judges.

PER CURIAM:

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO SECTION 25.031, FLORIDA STATUTES 1975, AND RULE 4.61, FLORIDA APPELALTE RULES.

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Fifth

Circuit that there are involved in the appeal of the above-styled

* * * * *

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1194

RODOLFO LOZANO,

Petitioner,

v.

THE TEXAS MEXICAN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1194

RODOLFO LOZANO,

Petitioner,

v.

THE TEXAS MEXICAN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. However, Respondent disagrees with the allegation contained in the statement regarding the physical condition of the tie on which Petitioner was injured. The evidence at trial did not establish that the Petitioner slipped on a freshly creosoted, wet and muddy railroad tie. Petitioner's description of the proceedings below is substantially correct, however, it should be added that Petitioner did file a Motion for New Trial which was denied by the Trial Court. It should

also be noted that Petitioner did not file a Motion for Rehearing with the Court of Appeals after the Trial Court was affirmed.

ARGUMENT

The decision by the Fifth Circuit upholding the directed verdict granted by the Trial Court is consistent with applicable decisions of this Court. *Inman* v. *Baltimore & Ohio Railway Co.*, 361 U.S. 138 (1959); *Brady* v. *Southern R. Co.*, 320 U.S. 476 (1943). Petitioner's basic contention is that the granting of the directed verdict below is in conflict with previous decisions by this Court "demanding" that an FELA case be submitted to the jury. Petitioner relies on *Rogers* v. *Missouri Pacific Railway Co.*, 352 U.S. 500 (1957) in support of this proposition. However, Petitioner has misconstrued the holding in *Rogers, supra.*

Rogers does not stand for the proposition that directed verdicts are never appropriate in FELA cases. Under *Rogers,* the trial judge still has the responsibility of appraising the proofs to determine whether a jury question is presented. If the court decides that, with reason, the conclusion may not be drawn that negligence on the part of the employer played any part in the injury of the employee, then it must keep the case from the jury. This Court recognized in *Rogers* that an FELA case should not go to the jury "where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers, supra* at 510. The test set out in *Rogers* is merely a restatement of the criteria previously established by this

Court for determining when a directed verdict should be granted in an FELA case:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims. *Brady* v. *Southern R. Co.*, 320 U.S. 476, 479-80 (1943); *accord, Service Auto Supply Co. of P.R.* v. *Harte & Co.*, 533 F.2d 23, 25 (1st Cir. 1976).

Pursuant to the *Rogers* standard, four members of the federal bench have appraised the proofs in this case and they have properly determined that a jury could not, with reason, conclude that the employer's negligence played any part in petitioner's injuries. Since this determination is consistent with precedent established by this Court, Petitioner has failed in his attempt to show that the decision of the Fifth Circuit is in conflict with applicable decisions of this Court.

A further indication that *Rogers* has not eliminated directed verdicts in FELA cases is the fact that this Court has held, in an FELA case subsequent to *Rogers,* that no jury question is presented where the evidence is so slender and tenuous "that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury." *Inman* v. *Baltimore & Ohio R. Co.*, 361 U.S. 138, 140 (1959). There have been other post-*Rogers* FELA cases where the evidence was such that the case should not have been submitted to the jury, all of which have been denied certiorari by this Court. *E.g., Davis*

v. *Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976); *Hartel* v. *Long Island Railroad Co.*, 476 F.2d 462 (2nd Cir. 1973), *cert. denied*, 414 U.S. 980 (1973); *MacPherson* v. *Boston and Maine Corp.*, 439 F.2d 1089 (1st Cir. 1971), *cert. denied*, 404 U.S. 947 (1971). These cases demonstrate that the courts still have a responsibility to maintain meaningful judicial supervision over FELA actions.

Petitioner's singular reliance on *Rogers* also leads him to criticize the Fifth Circuit's reference, in the opinion below, to *Detroit, T. & I. R. Co.* v. *Banning*, 173 F.2d 752 (6th Cir. 1949), *cert. denied*, 338 U.S. 815 (1949) in support of the statement that continuing repairs during a light, misty rain has not been considered negligence.

Banning involved an FELA action brought by an injured employee complaining that the defendant did not provide him with a safe place to work because he was required to work in the yard under muddy conditions, so that his boots became slippery and covered with mud. The court held that so long as the carrier provided means to counteract or avoid any temporary dangerous working condition resulting from severe climatic conditions, it was not negligence to continue with operation of the train. The *Banning* holding is consistent with similar rulings on the question of climatic conditions, *e.g.*, *Raudenbush* v. *Baltimore & Ohio R. Co.*, 160 F.2d 363 (3rd Cir. 1947), *accord*, *Rose* v. *Atlantic Coast Line Railroad Co.*, 277 F. Supp. 913, 919 (D.S.C. 1967), *affirmed* 403 F.2d 204 (4th Cir. 1968); *McGivern* v. *Northern Pac. Ry. Co.*, 132 F.2d 213 (8th Cir. 1942). Nevertheless, Petitioner argues that *Banning* is not controlling because it was decided prior to *Rogers, supra*, even though the question of climatic conditions was not involved in *Rogers, supra*.

Petitioner's criticism of the Fifth Circuit's reliance on *Banning* is inconsequential because he states that the correct rule of law on this question is "that the railroad has a duty to furnish sufficient instruments and other aids to decrease the danger from climatic conditions if this can be reasonably done." (Pet. Writ. Cert., 7) The Fifth Circuit's opinion in the present case specifically states that the "employer also attempted to protect against the development of any dangerous condition by providing a foot scraper to remove any mud." *Lozano* v. *The Texas Mexican Railway Co.*, 564 F.2d 720, 721 (5th Cir. 1977). Hence, the Fifth Circuit's decision to uphold the directed verdict is consistent with the rule of law cited by Petitioner.

Petitioner also complains that the Fifth Circuit should not have referred, in the opinion below, to the common industry practice of continuing repairs while a light, misty rain is falling. Again, this criticism provides no benefit to Petitioner. Respondent agrees with the rule of law cited by Petitioner that what is usually done may be evidence of what ought to be done, but that what ought to be done is fixed by a standard of ordinary prudence. However, at trial, the Petitioner failed to introduce any evidence to show that compliance with a standard of ordinary prudence would have required the Respondent to have done something different. The Petitioner presented no evidence at trial to show that what the Respondent did was *not* in compliance with the standard of ordinary prudence. The burden was on the Petitioner and the Petitioner simply failed to discharge this burden.

CONCLUSION

A Petition for Writ of Certiorari should be denied in this case because Petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. Certiorari should particularly be denied because this Court is being asked to merely reassess facts which have been previously judicially appraised by a total of four federal judges. The Court of Appeals correctly held that the Trial Court properly granted a directed verdict in this case.

Respectfully Submitted,

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